THE

CAMBRIDGE LAW JOURNAL

NOVEMBER, 1959

CASE AND COMMENT

CONSTITUTIONAL LAW—HABEAS CORPUS

ON the day of the summer adjournment the Home Secretary announced in the House of Commons the Government's intention to propose an amendment of the law so as to provide for an appeal from the Divisional Court to the House of Lords in any criminal cause or matter, including not only applications for habeas corpus but also applications for other prerogative orders and cases stated by magistrates or quarter sessions and for convictions for criminal contempt of court. The proposal is that an appeal should lie only where the point of law involved is one of general importance. At the same time it is proposed that the requirement of the certificate of the Attorney-General as a prerequisite to a criminal appeal to the House of Lords should be abolished and that appeals from the Court of Criminal Appeal should be dealt with on substantially the same basis as those from the Divisional Court; 610 H.C. Deb., cols. 669–670.

In [1959] C.L.J. 3–5 a contributor discussed the cases of *Re Hastings* (*No. 2*) and (*No. 3*), which caused the question of appeals in habeas corpus applications to be reviewed by the Government. These cases decided that in a criminal cause only a single application for the writ could lie to a Divisional Court of the Queen's Bench Division and that the Court of Appeal had no appellate jurisdiction therein. The decision of the Divisional Court of the Chancery Division ([1959] Ch. 368) has since been upheld by the Court of Appeal: [1959] 1 W.L.R. 807. But Hastings is not the only aggrieved person who has suffered from the present confused state of the law relating to habeas corpus. There is another recent decision which may serve to explain the willingness of the Government to facilitate rulings by the House of Lords on this most important topic.

In *R.* v. *Campbell* [1959] 1 W.L.R. 646 the judge of the Liverpool Crown Court held that, although the Crown Court was a court of assize and therefore had jurisdiction, in a proper case, to grant relief under section 6 of the Habeas Corpus Act, 1679, the applicant had failed to comply with a procedural condition precedent and therefore was not entitled to be discharged, notwithstanding that his trial had already twice been postponed by reason of the absence abroad of a prosecution witness. Hitherto this section of the Act of 1679 has been relied on to obtain bail as of right for accused persons who have not been put on trial at the first or second sitting of the competent court of assize. This is undoubtedly the law in the case of trial by quarter sessions: Assizes Relief Act, 1899, s. 3. Campbell's offence, however, was not triable by quarter sessions, and, therefore, since the judge held that the Crown Court, which was set up by the Criminal Justice Administration Act, 1956, had the jurisdiction commonly conferred on courts of assize, Campbell's application fell to be determined under section 6 of the Habeas Corpus Act, 1679. The relevant part of this Act is as follows:

> "Provided alwayes . . . that if any person shall be committed for . . . fellony plainely and specially expressed in the warrant of committment upon his prayer or petition in open court the first weeke of the terme or first day of the sessions of oyer and terminer or generall gaole delivery to be brought to his tryall shall not be indicted in the next terme . . . after such committment . . . judges of the court of King's Bench . . . are hereby required upon motion to them made in open court the last day of the terme sessions . . . either by the prisoner or anyone in his behalf to set at liberty the prisoner upon baile unless it appeare that the witnesses for the King could not be produced in the same terme . . ." "And if any person . . . committed as aforesaid upon his prayer or petition in open court the first weeke of the terme or the first day of the sessions . . . shall not be indicted and tryed the second terme sessions . . . after his committment . . . he shall be discharged from his imprisonment."

In the case under discussion the application to the judge was made by the Crown and not by the prisoner. Moreover, the prisoner did not comply with the procedural conditions of the Act of 1679. Indeed, the judge doubted if it was possible in terms of today to comply with these requirements and accordingly the application for habeas corpus failed. The judge was, however, able to release Campbell by ordering that the case should lie on the file and not

be proceeded with further without an order of the court. Nowadays the writ of habeas corpus is normally issued by virtue of the common law jurisdiction and not under the statute. But if the ambiguity and out-of-date language of the statute stands in the way of securing a speedy trial for an accused person, as this case shows, it is time for intervention by the legislature. If this can more speedily be secured by throwing open habeas corpus applications to appeal to the House of Lords, so much the better.

E. C. S. WADE.

ADMINISTRATIVE LAW—ALTERNATIVE REMEDIES UNDER THE PLANNING ACTS

ALTHOUGH the decision of the Court of Appeal (noted in [1958] C.L.J. 135) has been reversed, the principles of law laid down by the majority have not been seriously upset by the House of Lords in *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* [1959] 3 W.L.R. 346. The point upon which the two courts differed was whether the company, which quarried stone under an agreement "confirmed and made binding" by a private Act of Parliament, could carry on their operations without seeking planning permission because they were "authorised by any local or private Act of Parliament" within the Town and Country Planning General Development Order, 1950. The House of Lords held that the company were within this exemption, whereas the majority of the Court of Appeal had held that the operations were authorised by the agreement rather than by the private Act which confirmed it.

But the principal interest of the case lay in a preliminary point which is of great importance both for the law of planning and for the sector of administrative law which deals with alternative remedies. It is provided by section 17 of the Town and Country Planning Act, 1947, that any person wishing to know whether his operations will require planning permission "may . . . apply to the local planning authority to determine that question"; he may then appeal from the local authority to the Minister, whose decision "shall be final" except for the purpose of enforcement proceedings. The question was, did these provisions oust the jurisdiction of the High Court? Were the company entitled, instead of applying to the local authority, to apply to the court for a declaration to settle this question of law in their particular case? On a narrow view, this is merely a question of construction of the Act. But on a broader view it is a question of judicial policy, for the court can

make its own choice where, as here, the language of the Act admits of doubt. Two conflicting canons of construction are available. One is that the subject's recourse to the Queen's courts is not to be taken away except by clear words in a statute. The other is "the principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the Statute." These well-known words of Lord Halsbury in *Pasmore* v. *Oswaldtwistle U. D. C.* [1898] A.C. at p. 394 were not, however, quoted. The House of Lords took a firm stand on the former doctrine. They held that the procedure under section 17 of the Act was merely an alternative, and left it open to anyone to ask the court to declare whether or not his operations required planning permission. The only judge who took the contrary view at any stage was Hodson L.J. in the Court of Appeal, who held that there was no remedy outside the Act, since "Planning is itself the creature of statute, and Parliament has provided its own method for the determination of the question here involved." But Lord Simonds laid stress on the "fundamental rule": "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. . . . There is nothing in the Act to suggest that, while a new remedy, perhaps cheap and expeditious, is given, the old and, as we like to call it, the inalienable remedy of Her Majesty's subjects to seek redress in her courts is taken away." And he added: "It might even be thought surprising that the Minister should not be glad to have such questions authoritatively determined."

Two alternative legal avenues are therefore open for these important planning questions. Lord Jenkins' view was that section 17 was intended to provide people with "a cheap and expeditious procedure by which they can if they so desire ascertain the extent of the restrictions which, according to official opinion, are imposed by the Act on their ordinary rights as landowners." But the Act gives the authorities power to make binding decisions, and in effect makes them special tribunals. A decision under section 17 has positive legal results, and is a good deal more than an indication of official opinion. The strongest argument for the parallel jurisdiction is perhaps that used by Lord Simonds and in the Court of Appeal by Lord Denning: if enforcement proceedings are taken, the question is not prejudiced by an official decision, and is one for the ordinary courts of law. In the last resort, Parliament puts its trust in the courts. It cannot then be said that the design was to take the subject away from the courts altogether and entrust it

to administrators. As if to reinforce this argument retrospectively, these decisions under section 17 have recently been made subject to appeal to the High Court on a point of law in the manner provided by the Tribunals and Inquiries Act, 1958, s. 9: Town and Country Planning Act, 1959, s. 32. All roads now lead to the Queen's courts—but one is direct and the other is circuitous. Whatever may have been the intention in 1947, it is now quite plain that the ministerial avenue is not to be a blind alley. Since the Franks Report of 1957 (Cmnd. 218) the Queen's courts have been recovering some of the ground which had been lost to special tribunals.

H. W. R. WADE.

ADMINISTRATIVE LAW—CERTIORARI—ERROR OF LAW

IN *Baldwin & Francis, Ltd.* v. *Patents Appeal Tribunal* [1959] 2 W.L.R. 826 the House of Lords has upheld the decision of the Court of Appeal noted in [1958] C.L.J. 137. But the reasons for the decision are now different and, if it may respectfully be said, more satisfactory. The question was whether certiorari would lie to quash a decision of the Patents Appeal Tribunal (Lloyd-Jacob J.), from which there was no appeal provided by statute. The appellants' complaint was that the tribunal had misconstrued the specification of their patent for a device to prevent the re-closing of an electric circuit in which there was an earth fault. Another firm had later obtained a patent for a somewhat similar device, and the tribunal had upheld their contention that there was no substantial risk of infringement of the prior patent. But in its details the tribunal's decision was strange. The prior patent had four alternative branches, A, B, C and D. The whole case was that alternative D was likely to be infringed, but when the tribunal some time later gave its decision, it rejected the complaint on the ground that there was likely to be no infringement of alternative B. Thus the decision appeared to miss the point.

There being no appeal, and the tribunal having plainly acted within its jurisdiction, the only recourse was to seek certiorari for error of law on the face of the record. This head of jurisdiction has recently been revived with great success; yet it is somewhat anomalous, for if a tribunal acts within its jurisdiction it is at liberty to make mistakes of law just as much as other mistakes; the power to decide must include the power to err. But if the decision bears an error of law on its face, that is (so to speak) an affront to the legal system which the court cannot overlook; and so the courts have assumed an appellate jurisdiction (for that is what it comes to) on patent but not on latent points of law.

But would the remedy lie in this case? The Court of Appeal refused it on the ground that the issue was too technical for the court to be able to decide it, bearing in mind that evidence cannot be reviewed on an application for certiorari. If this ground had been upheld, it would have revealed yet another defect in the procedural rules which clog this remedy, which were the subject of an article in [1958] C.L.J. 218. But, as was said by Lord Morton, "it would indeed be regrettable in present times, when certiorari lies to so many tribunals dealing with scientific matters, if the courts were precluded from considering whether there was an error of law on the face of the record because they did not know the meaning of certain technical terms." And Lord Denning said: "The one thing that the court ought not to do is to refuse jurisdiction in a case because it does not understand the technical terms employed in it. Scientists and engineers are entitled to have their rights enforced and their wrongs redressed as well as anyone else." Attention was drawn to the court's power to appoint assessors under section 98 of the Supreme Court of Judicature (Consolidation) Act, 1925. But surely what is really needed is that the various procedural obstacles should be cleared away by new rules of court. The welcome aspect of the case is that the House of Lords has refused to allow certiorari to be hobbled by yet another anomaly, and has recognised the need to apply the remedy with fortitude in order to preserve judicial control of tribunals. "There is nothing more important, to my mind," said Lord Denning, "than that the vast number of tribunals now in being should be subject to the supervision of the Queen's courts. This can only be done if the remedy by certiorari is maintained in the full scope which the great judges of the past gave to it. When there is no right of appeal, this historic remedy has still a valuable part to play."

After thus earning the gratitude of all persons interested in administrative law, the appellants yet again lost their case. The House assumed in their favour that the rival patent specifications were part of the record, and it was agreed that an error in interpreting a document was an error of law. But still there was no error "on the face," for the mistake (as it was alleged to be) in the tribunal's decision could be demonstrated only by rehearsing the argument presented to the tribunal, and showing that the decision appeared to disregard it. From the papers themselves no such mistake could be deduced. Even though the decision might appear odd, it was impossible to prove from the face of the record that it was based on any misconstruction of the specifications. Lord Denning did indeed take a different view, for he

thought that the record showed that the tribunal had acted on extraneous considerations, a familiar form of legal error. But he also considered that the right course for the appellants to take was to sue for infringement, or to ask the tribunal to correct its mistake, and that certiorari should in any case be refused.

Lord Tucker's speech (in which Lord Somervell concurred) contains some guarded but important remarks, suggesting that the newly revived jurisdiction to quash for error of law on the face may be due for some hard pruning. He reserved for some future occasion the question whether the "record" for this purpose ought to mean anything more than the order or decision as recorded. An order may have, in Lord Sumner's classic phrase, "the inscrutable face of a sphinx." It might also speak, said Lord Tucker, "with the ambiguous voice of the oracle." He hinted that there might well be no more power for the court to intervene in the latter case than in the former. He did not refer, as Lord Denning did, to section 12 of the Tribunals and Inquiries Act, 1958, as to giving reasons, which is intended to be the death warrant of sphinxes and oracles; but admittedly the Act does not apply to the Patents Appeal Tribunal, an unusually exalted body consisting of a High Court judge. Lord Tucker also said that much confusion had arisen from failure to distinguish excess of jurisdiction from error of law on the face, and that certain (unspecified) *obiter dicta* in the *Northumberland Case* [1952] 1 K.B. 338 should be reserved for future consideration. His Lordship no doubt felt that the tendency to develop "error of law on the face" into a general appeal on points of law should be carefully watched, and if necessary corrected.

H. W. R. Wade.

CONFLICT OF LAWS—SUBSTITUTED OBLIGATION—PROPER LAW—RENVOI

For the Court of Appeal *Re United Railways of the Havana and Regla Warehouses, Ltd.* [1959] 2 W.L.R. 251 was avowedly a "troublesome case." But for the student of conflict of laws it will be welcome for providing what is probably the most significant judicial contribution to his subject of recent years.

An English company which operated a railway in Cuba raised capital in the U.S.A. by issuing "trust certificates," which were repayable over fifteen years with interest. To provide security the company, through the medium of a subsidiary, had first sold its rolling stock to a trust company in Pennsylvania, then hired it

back under a fifteen year "lease," and later received a reassignment of it subject to the lease. From the rent payable under the lease the trust company made the appropriate payments to certificate holders.

The company defaulted in its payments of rent and the Cuban State later bought the railway, agreeing to "liberate" the company from responsibility in respect of the trust certificates. The company was now being wound up in England and the trust company's successor sought to prove on behalf of the certificate holders for arrears due under the lease. The Court of Appeal, affirming Wynn-Parry J., held unanimously that a proof should be admitted, though Willmer L.J. dissented on the question of its quantum.

Of several important points raised, three may be selected as of principal interest.

1. What law governs the novation of a debt by substitution of a new debtor? The court considered first the correct analysis. A novation could be regarded either as a single juridical act, or as an act comprising two elements, the annulment of one debt and the creation of a substituted debt in its place. The court preferred the dichotomy. "The discharge of the original debtor must precede, and is distinct from, the acceptance by or imposition upon the creditor of a substituted debtor."

Consequently the validity of such a novation could not be referred as a whole to the *lex situs* of the debt, as each element required separate consideration. The court had no doubt that the discharge of the existing debt, like the discharge of a future contractual obligation, was to be governed by the proper law of the contract. On the other hand, the second element might be determined, it was suggested, by the law with which the new debtor's assumption of liability was most closely connected.

This solution contrasts with the established rule that a compulsory transfer under the *lex situs* of the *right* to a debt will be recognised (*Arab Bank* v. *Barclays Bank* [1954] A.C. 495). But the court met this objection by pointing out that there is no true analogy between the two situations. The substitution of a creditor is simply a transfer of property, and does not prejudice the debtor; the substitution of a debtor is not a proprietary transaction, and may prejudicially affect the creditor.

The drawing of this distinction and the rejection in the present situation of the *lex situs* as the test involved a conflict with the *Russian Bank* cases. Thus, Maugham J. had held in *Re Russian Bank for Foreign Trade* [1933] Ch. 745 that the liabilities of that

bank as well as its assets had been validly transferred by confiscatory legislation in the country where they were situate. But as the Court of Appeal now pointed out, the relevance of the proper law of the contract to the discharge of a debt was not argued before him; and furthermore "the *Russian Bank* cases . . . were cases of so special a character as to afford little guidance in the elucidation and application of principles of private international law in general."

2. What was the proper law of the lease? The court adopted Viscount Simonds' formulation of the proper law of a contract as that "with which the transaction has its closest and most real connection" (*Bonython* v. *Commonwealth of Australia* [1951] A.C. 201, 219).

The choice was clearly between the laws of Cuba and Pennsylvania. In favour of Cuba was the presence there of the rolling stock which was the subject of the lease and of the railway from which the rent was to be derived; moreover, the lease expressly provided that the parties intended "to enter into and execute" it in accordance with the law of Cuba. On the other hand, the rent was payable in American currency in Pennsylvania, and the lease itself was merely a convenient mechanism involved in effecting an essentially American method of raising capital.

Jenkins and Romer L.JJ. agreed with the trial judge that Cuban law applied only to the formalities of execution of the lease and that the proper law of the contract as a whole was that of Pennsylvania. However, Willmer L.J. was not prepared to "split the contract" and in his judgment its proper law throughout was Cuban.

This is a nice illustration of the difficulties which so often beset the court in discovering the proper law; but here the exercise, though instructive, was purely academic, for it was found as a fact that under neither law had the debtor been discharged.

3. Does the principle of *renvoi* apply to the proper law of a contract? Under Cuban private international law the question of the debtor's discharge would be referred to the law of Pennsylvania, and so it was argued that even if the proper law were Cuban, the result on *renvoi* principles should be an application of Pennsylvanian law. This argument was supported by Lord Wright's dictum in *Vita Food Products, Inc.* v. *Unus Shipping Co.* [1939] A.C. 277, 292, and was apparently accepted by Wynn-Parry J. despite the strong juristic criticism to which it had been subjected. There will be satisfaction, therefore, that the Court of Appeal disagreed with him (*obiter*, on the part of the majority), and were unanimous that "the principle of *renvoi* finds no place in the field

of contract." Thus, if the proper law were Cuban, the reference would be to Cuban domestic law. The dispelling of this troublesome doubt may well be the most important result of this very far-ranging case.

J. C. HALL.

CONTRACT—THIRD PARTY—BENEFIT OF EXEMPTION CLAUSES

Midland Silicones, Ltd. v. *Scruttons, Ltd.* [1959] 2 W.L.R. 761 was a test case brought to determine whether the defendant stevedores, engaged by the carriers, whose servants in performance of their functions as stevedores in delivering cargo had carelessly damaged that cargo, could, in an action in tort brought against them by the plaintiffs, the cargo-owners consignees of a bill of lading, "rely upon any immunity from or limitation of liability contained in the contract of affreightment made between the cargo-owner and shipowner (or carrier) by whom the stevedores are engaged."

Diplock J. held that the stevedores were not entitled to rely upon the exemption clause. The matter has been much controverted in Australia and in the United States, and his conclusion is supported by a majority judgment (3–2) in the High Court of Australia, reported in [1956] 1 Lloyd's Rep. 346. [The most recent decision of the U.S. Supreme Court in a similar sense is not available to me.] There is therefore some probability that the conclusion may recommend itself to our own higher jurisdictions.

Nevertheless, the judgment leaves much to be desired. The judge dismisses as *obiter*, unnecessary and erroneous—in a manner which seems to me unduly cavalier—a good number of deliberate statements of law made by his predecessors and in particular this statement of Scrutton L.J. in *Mersey Shipping and Transport Co., Ltd.* v. *Rea, Ltd.* (1925) 21 Ll.L.R. 375, 377: ". . . where there is a contract which contains an exemption clause the servants or agents who act under that contract have the benefit of the exemption clause. They cannot be sued in tort as independent people, but they can claim the protection of the contract made with their employers on whose behalf they are acting."

Now, whether or not a majority of the House of Lords in the *Elder Dempster Case* [1924] A.C. 522 expressly accepted Scrutton L.J.'s statement—a question which has been much argued and could be argued indefinitely, though some of them certainly did—the statement was undoubtedly his own *ratio decidendi* in that case in the Court of Appeal [1923] 1 K.B. 420, 441–442. His *ratio*

decidendi is quite simply, of itself, authority which should induce in a puisne judge an anxious consideration before he departs from it, especially in a cognate bill of lading case. The judge not only passed it by but, without a proper examination of its merits, rejected it as contrary to "the simple, fundamental, though no doubt old-fashioned, principles" which he held to be applicable to the case. It is really extremely improbable that Scrutton L.J. was unaware of the "simple and fundamental principles" reasonably to be regarded as applicable to a bill of lading: the suggestion that he should be considered as addicted to new-fangled innovations is truly nonplussing.

It is in any event a pity that due attention was not given to Scrutton L.J.'s statement, whatever its status; for that would have helped to define, in a manner in which it was not defined, the issue actually falling to be decided by the judge. The Lord Justice was no doubt impatient and might well omit—I think he did here omit —to put his proposition in formally complete language. Still his proposition is readily intelligible in the context in which it was offered and, at least in its simpler instances, is, as one might expect, evidently correct.

To take such an instance. If the owner of goods agrees with the carrier on a particular mode of performance of the contract of carriage, the owner cannot complain of that stipulated mode either against the carrier or against the stevedores if the carrier, being entitled to do so, makes his performance by the hand of stevedores employed for that purpose. So if the owner has agreed—let it be supposed—that his barrels are to be unloaded by being freely rolled down an incline, and the barrels are thus unloaded by stevedores employed by the carrier, the owner cannot sue the stevedores for damage caused by that method of unloading, however much he may prove that that method was in the abstract dangerous or contrary to good stevedoring practice: it is sufficient that it was the stipulated mode of unloading. One may argue what metaphysical construction, if any, is to be used to justify the conclusion—implied bailment upon terms, implied agency, transferred licence or other largely fictitious device: on the level of plain sense it is both exact and sufficient to use Scrutton L.J.'s own words: "They (sc. here, the stevedores) cannot be sued in tort as independent people, but they can claim the protection of the contract made with their employers on whose behalf they are acting." If that is to be held to amount to a vicarious immunity of the stevedores, that is just too bad: in such a sense, if appropriate, there is vicarious immunity, to this degree at any rate.

Once the more obvious application of Scrutton L.J.'s *ratio decidendi* is appreciated, the real complexity of the matter begins to appear. For it is well enough known, and may reasonably be supposed to have been known to Scrutton L.J., that a personal pact by A not to sue B for damage wrongfully done to A's goods by B and C would not normally preclude A from suing C. When the owner in a bill of lading has agreed that his goods may be carelessly unloaded without giving him a right of action for damages (if I may be permitted a set of words calculated not to prejudge the issue), how is the exemption clause to be classified? Has the owner agreed to accept as sufficient in respect of his goods a mode of unloading which in respect of other goods would be wrongful? Or should we say that there is a personal pact by the owner not to sue the carrier personally for breach of a duty which continues to subsist and is owed generally, by the carrier and others, in respect of the owner's goods? If the exemption amounts to a personal pact not to sue, no doubt the stevedores cannot avail themselves of it—or at least not, I think, on the simple ground that they are acting as the carrier's agents. If the exemption amounts to the stipulation of a mode of performance as sufficient, the rendering of that performance by the stevedores does not expose them to an action by the owner. And there may be special difficulty where the exemption clause does not exclude liability but limits its amount.

It looks as if Scrutton L.J. inclined to the view that the notion of personal pact was not appropriate to a bill of lading and was disposed to regard exemption clauses, or some of them, as establishing, in a bill of lading, agreed modes of performance. Which may be the better view, *quaere*; but it will be time enough for the academic student to dissent, if he must, from Scrutton L.J. when he has endeavoured to understand, to the best of his own abilities, what that eminent Lord Justice said.

The judge further dismissed as *obiter*, unnecessary and erroneous —and not without a pretty quip (p. 774)—a good number of statements of law by Denning L.J., as he then was; and he was for his own part content to rely upon *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge and Co., Ltd.* [1915] A.C. 847 as apposite. It is irrelevant to inquire whether Lord Denning's observations were *obiter*. What is clear is that the *Silicones* case has nothing to do with the *jus quaesitum tertio* discussed in the *Dunlop* case, where there was an express stipulation in favour of Dunlop as a third party; and it is specially remote from cases dealing with "promises expressly made in favour of an interested person" to which Lord Denning was mainly directing his attention. We are not concerned in the

Silicones case with special promises made expressly (or even by implication) in favour of the stevedores: for the sufficient reason that there were no such promises. If Lord Denning's observations were *obiter*, the review of them in the *Silicones* case, and the discussion of *Dunlop's* case, was doubly *obiter*. But again it served to distract the attention of the court from the relevant issue. The answer to the question put in the *Silicones* case is not concluded by any opinion, however old-fashioned, as to the necessity of consideration moving from the promisee: it is surely clear that Lord Justice Scrutton held (and properly, if I may say so) opinions on that subject which by any standard were old-fashioned enough.

An adequate note should no doubt discuss the case of *Adler* v. *Dickson* [1955] 1 Q.B. 158, though that concerned a passenger, because Scrutton L.J.'s statement was considered there. It must suffice here to note the great, and appropriate, circumspection shown—see especially p. 195—by Jenkins L.J., and the equally decent caution of Morris L.J.—see especially p. 200. And it would be right to give credit to Kitto J. also for the reserve and care displayed in a judgment which in the Australian High Court case (*supra*) was the critical opinion. For my own part I have had the advantage of seeing Mr. Brian Coote's dissertation on Exemptions whilst he was working on it—for further light upon the matter we shall have to wait until he has completed and published it.

C. J. Hamson.

CONTRACT AND TRUST—THIRD PARTY BENEFICIARIES—MONEY PAID UNDER CONTRACT OF INSURANCE

Green v. *Russell* [1959] 1 Q.B. 28 (Ashworth J.); [1959] 3 W.L.R. 17 (C.A.) presents a puzzle rather than a problem; but it is the proper kind of legal puzzle.

The main query was whether a sum of £1,000 received by the plaintiff, Mrs. Green, was a "sum paid or payable on the death of the deceased under any contract of assurance or insurance" within the meaning of the Fatal Accidents (Damages) Act, 1908. If it was, Mrs. Green was by that Act entitled not to bring it into account in this action in which, as administratrix of her son, who had died as the result of a fire at his place of employment, she was, *inter alia*, claiming in respect of his death damages under the Fatal Accidents Acts against his employer, Mr. Russell. [The actual defendant was Mrs. Russell, the employer's widow and personal representative, as he also had died in the fire; but in this

note it is convenient not to distinguish between the employer and his personal representative.] The employer admitted liability, and the amount of the plaintiff's loss by her son's death was also agreed at £1,300. The question was whether the employer ought to pay that amount or that amount less the sum of £1,000 already received by the plaintiff in the following circumstances.

The employer, to the knowledge of his employees but not (as it was found) as the result of any binding contractual arrangement with them, had taken out with the Yorkshire Insurance Company a group accident insurance policy covering his employees. The premium was paid by the employer and the policy identified him as "the insured." The policy recited that "the insured is desirous of securing payment of benefits as hereinafter set forth to any insured person"; it listed "the insured persons" in a schedule which included the son's name with £1,000 set against it; and it provided, so far as relevant, that in the event which occurred "the company shall pay," without specifying to whom, the said sum of £1,000. The policy also contained the usual clause entitling the company to treat "the insured"—that is to say, the employer—as the absolute owner of the policy. The company acted under this clause (which, it should be noted, would have been effective even if the employees had unquestionable equitable rights under the policy) and paid the £1,000 to the employer. The employer paid the £1,000 over to the plaintiff.

It was contended for the employer (meaning, no doubt, the insurance company which had insured his liabilities as employer) that if the employees had no enforceable rights at common law or in equity under the policy, the fact that the £1,000 originated from a contract of insurance was irrelevant. The relevant payment was not that by the company to the employer (which no doubt was a payment "under a contract of insurance") but that by the employer to the plaintiff. If the employees had no enforceable rights under the policy, this payment by the employer was a voluntary gift—though no doubt there was a reasonable expectation that it would be made. It was, in any event, not a payment "under a contract of insurance" and was therefore not excluded from account by the 1908 Act.

It was categorically and expressly held by the Court of Appeal that in the circumstances rehearsed the employees had no enforceable rights at common law or in equity under the policy. Thus, *Green* v. *Russell* becomes an authority on the controverted question of the rights of "third-party-beneficiaries," and indeed a "strong" authority—for three reasons. First, because the court treated the point as virtually unarguable. Secondly, because

Green v. *Russell* is surely easily distinguishable—if it was desired to distinguish—from *Vandepitte's Case* [1933] A.C. 70, which was cited as authority, in that it would not have been difficult to infer in our employer an "intention to create a beneficial interest for [the employee] either specifically or as member of a described class" which in *Vandepitte's* case (at p. 80) was treated as a critical factor. Thirdly, because it was necessary to distinguish *Bowskill* v. *Dawson* [1955] 1 Q.B. 13, where employees had been held to have enforceable rights under a group accident insurance policy; and the grounds of distinction offered, though no doubt technically justifiable, amount to no more than that the firm in the *Bowskill* case was bigger, the machinery more elaborate and the scheme more publicised: in fact both employers were engaged upon substantially the same operation. *Green* v. *Russell* evidences an apparently very firm intention on the part of the Court of Appeal to have nothing to do with third-party-beneficiary rights despite Lord Denning's recent advocacy of them.

Having held that the employees had no enforceable rights, all the judges agreed in the conclusion that the plaintiff nevertheless need not bring the £1,000 into account. The reasons for their conclusions are, however, sufficiently different. The reason proposed by Ashworth J. was that the expression used by the Act "is descriptive of the sum itself and does not involve by implication the corollary that the sum was paid or payable to the deceased under the contract of insurance." In the Court of Appeal Pearce L.J. accepted this reason as his own second ground for his conclusion and elaborated it as follows: "The legislature contented itself with describing the nature of the moneys that were not to be taken into account without seeking to limit the exact path of those moneys or specifying from whom and by whom they had to be received. . . . It (the payment received by the plaintiff) is, in the normal sense, money paid on the death of her son under a contract of insurance."

This view of the meaning of the Act causes no supplementary difficulty; but it was not accepted by Romer L.J., and with Hodson L.J.'s express concurrence he rejected the view that "upon payment by the insurance company to the defendant of the £1,000 in question it became irrevocably stamped as a section 1 [of the 1908 Act] payment." Romer L.J. was willing to extend the Act but only to "payments contractually made to or on behalf of or for the benefit of the employees or dependants." It was only because the payment to the employer fell within such a class that the plaintiff need not account for the £1,000. Pearce L.J.'s first reason is of the same order. He found in the plaintiff's

favour because "the terms of the agreement as a whole make it clear that (whatever may be Mr. Green's legal or equitable rights against the policy holder) the £1,000 payable on Mr. Green's death is intended by the parties to be a benefit to Mr. Green's estate and it not intended for the pocket of Mr. Russell. Moreover, I think that the terms of the agreement as a whole show that the parties envisage payment of the £1,000 direct to the policy holder and payment over by him to Mr. Green's estate."

Now this view gives rise to the nicest conundrum. How can Mr. Russell receive a payment which "is intended by the parties to be a benefit to Mr. Green's estate and is not intended for the pocket of Mr. Russell" without an enforceable right arising in Mr. Green's estate? It would seem not only that Mr. Russell is a trustee of the money for Mr. Green's estate but that there is against him a common law claim of money had and received for the use of the plaintiff. And similarly, I think, in case of a "payment contractually made on behalf of or for the benefit of" Mr. Green. Having expelled third-party-beneficiaries so forcibly out of the front-door, is the court permitting their re-entry by this back-door? Is the upshot that, though the employee had no right to have the contract between the policy holder and the company enforced, yet if the company paid the money to the policy holder, the employee or his estate could require its payment over? This is, no doubt, a possible half-way house; but it would seem unsatisfactory, and it is difficult (see, *e.g.*, p. 27 and p. 32) to attribute such an intention to the court. We can, I think, understand why, though the four judges have been unanimous in favour of the plaintiff, leave to appeal to the House of Lords has been granted. It may, after all, be wise to await Lord Denning's expression of opinion before finally concluding our own.

It should be noted that no argument was directed to the question whether, on the view taken of the insurance contract, Russell had an insurable interest in his employees' lives; and it would be of interest to know how the receipt by Russell's estate of the £1,000 was regarded for the purpose of death duties on that estate.

This note does not purport to deal with the assessment of damages under the Fatal Accidents Acts generally; but the student should, on that question, be referred to, and should compare and contrast, the almost contemporaneous case of *Jenner* v. *Allen West & Co., Ltd.* [1959] 1 W.L.R. 554 (C.A.), where a voluntary payment made by the defendant to the widow was held to be deductible.

C. J. Hamson.

MASTER AND SERVANT—DUTY OF MASTER—DEFECTIVE TOOL

In *Davie* v. *New Merton Board Mills, Ltd.* [1959] 2 W.L.R. 331—already noted: at first instance [1957] C.L.J. 134, in the Court of Appeal [1958] C.L.J. 27—despite an equal division in the lower courts, the House of Lords was unanimous in holding that an employer was not liable for the injury caused to his workman by a defect in a tool supplied by him when that defect, though due to the negligence of the manufacturer, was not discoverable by any examination reasonably to be expected either of the retailer from whom it was bought or of the employer and his servants. Their Lordships expressly stated, and by overruling *Donnelly* v. *Glasgow Corporation* 1953 S.C. 107 made it clear, that the result would have been the same if the tool, being of a normal standard type, had been bought direct from the manufacturer; but the case of a special tool ordered from the manufacturer was left open.

This note is not concerned with the social or other desirability of the result attained by their Lordships, nor with the queries explicitly, and therefore deliberately, left unresolved by them. It is concerned with the legal mechanism operating (but not, at any rate explicitly, employed) to produce the result, and with the unexamined consequences of that operation. The student should be encouraged to detect, and to reflect upon, the process of decision. The decision in *Davie's* case depends upon the view taken of the central and simple point—the nature of the master's duty to the servant. Admittedly a considerable body of authority seemed prima facie to suggest that the master's duty to the servant was a limited duty of care; but it is equally clear that this duty had historically been very markedly stepped up. *Davie's* case constituted a critical instance: how, at this point, would the development go?

In the absence of any explicit choice of category, if the court, in Cardozo's phrase, seeks merely to "match coloured threads," the direction taken will largely depend upon the category into which the duty at issue is automatically or unconsciously classed. If the mind directs itself to the law of torts and to the nature of the duty ordinarily there owed, it is led to the category of vicarious liability, and would tend to conclude that, the default of the manufacturer being outside the scope of vicarious liability as normally understood, the employer is not liable. The student should note the degree to which their Lordships' reasoning in *Davie's* case is dominated by the notion of vicarious liability. If, however, we think in terms of contractual duty—and there was a

contract between the employer and his servant—the standard of duty is almost automatically pitched higher. In the context of contract we do not usually have recourse to the notion of vicarious liability; for it is not only fault or imputed fault which makes a contractor liable. For example, a person letting out the *Davie* tool for hire would, at common law, be liable for the negligent defect in its manufacture, even though he was not the manufacturer and even if he had bought it on the open market as a standard tool—unless, perhaps, he let it under a trade-name—in spite of the fact that, on the better view, there is no absolute warranty of fitness for a purpose on the hire of such a chattel (*Hyman* v. *Nye* (1881) 6 Q.B.D. 685).

It is noteworthy that the most categorical of the statements in the House of Lords denying the master's liability—that of Viscount Simonds—classes the duty most absolutely in tort, not only stating quite blankly that "this action was founded in tort," but adding that "it can only lead to confusion, if, when the action is in tort, the court embarks on the controversial subject of implied contractual terms." Lord Reid's decision is a good deal less absolute; and it is again to be noted that he is much more cautious in his classification: he said: "A master's duty to his servant with regard to the safety of the plant supplied should, I think, be regarded as a part of the law of tort. . . . It was common at one time to regard it as depending on the contract of employment. . . . No doubt this view leaves the court much scope. . . ." Lord Tucker and Lord Keith are content, without specification, to refer to the master's "common law obligations," and Lord Morton speaks of the duty owed by the master "at common law"; but it would seem in the context that the common law adverted to is predominantly tortious. On the other hand, in the previously leading case of *Wilsons and Clyde Coal Co., Ltd.* v. *English* [1938] A.C. 57, which extended the master's duty, the emphasis of Lord Wright was (see, *e.g.*, p. 78) on the "fundamental obligations of a contract of employment."

How should the master's or the servant's duties be classified? How will they in future be classified? There is, after all, much authority, some of it very recent, for regarding these duties as based upon and arising out of the contract of employment. In the very recent case of *Lister* v. *Romford Ice and Cold Storage Co., Ltd.* [1957] A.C. 555 not only was the contractual nature of the servant's duties stressed but Viscount Simonds himself said: ". . . I think it right to say that I concur in what I understand to be the unanimous opinion of your Lordships that the servant owes a contractual duty of care to his master and that a breach

of that duty founds an action for damages for breach of contract. . . . It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract. Of this the negligence of a servant in performance of his duty is a clear example." Surely if a servant's duty is contractual, the master's correlative duty can and should be regarded as similarly contractual? Indeed, most recently of all, in *Matthews* v. *Kuwait Bechtel Corporation* [1959] 2 Q.B. 57 —noted *infra*, p. 163—the Court of Appeal, relying, *inter alia*, upon *Lister's* case, has expressly held that the claim for personal injuries by a servant against his master is properly pleadable in contract.

If the contractual aspect of the master and servant relationship had been more present to their Lordships' minds in *Davie's* case, it would not, perhaps, have been said, as it was at page 343, that the servant's claim—which after all had obtained the approval of Jenkins L.J., as he then was—"was against reason, contrary to principle, and barely supported by authority." Indeed, the contractual duty which Jenkins L.J. believed to exist in *Davie's* case has a very considerable common law pedigree and was stated with great sobriety and accuracy by, for example, Montague Smith J. in the Exchequer Chamber in *Francis* v. *Cockrell* (1870) L.R. 5 Q.B. 501, 513: "I think, in conformity with the decision in *Readhead* v. *Midland Ry.*, that there was no warranty or insurance that the stand was absolutely safe; but, I think, that there was an implied undertaking on the part of the defendant that due care had been used in the construction of it. It seems to me that, in cases of this kind which relate to things and not to personal services, the undertaking or promise to use due care may be more correctly stated in an impersonal than a personal form, and the proper mode of stating it is, the defendant promised that due care and skill had been used in the construction of the building; or the obligation may be put in the other form, that the building was reasonably fit for the use for which it was let, so far as the exercise of reasonable care and skill could make it so." Surely in *Davie's* case also, a thing—there, a tool—was supplied for use under a contract which cast upon the defendant a duty of due care, and, to adopt the impersonal form recommended, due care and skill had not been used in the construction of that thing, even though the contractor himself, the master, and all the persons for whom he might be vicariously liable in tort, had been subjectively very diligent.

However the matter may now stand resolved, what the academic student should note is the practical consequences of an

apparently theoretical classification of duties, and the constraining effect of such a classification, especially when it amounts to the instinctive acceptance of a category—that is to say, of a series of imperfectly examined analogies. The instinctively accepted analogies compel as apparently inevitable a conclusion which, considered without commitment, will be seen to have been anything but inevitable.

C. J. Hamson.

CONTRACT—CONSIDERATION—RETAIL PRICE—COPYRIGHT

"Consideration" is still a concept which can evoke different responses in different judges; and the judges in *Chappell & Co., Ltd.* v. *Nestlé Co., Ltd.* [1959] 3 W.L.R. 168 (H.L.) were no exception. The point at issue in the case, said Lord Tucker, "though short, is one of considerable difficulty." It concerned section 8 (1) of the Copyright Act, 1956, which permits a person to make a record of a musical work for the purpose of its being sold retail, if he gives notice to the owner of the copyright and pays to him as a royalty 6¼ per cent. of the "ordinary retail selling price." The appellants held the copyright in "Rockin' Shoes," a musical work of which H. Co. had manufactured cheap, thin records, which were to be mounted on cardboard discs that carried advertisements for Nestlé chocolate. Nestlé, Ltd., advertised these records for sale to the public at 1s. 6d., stating that three wrappers of their sixpenny bars of chocolate should be sent in with the postal order. The wrappers were always thrown away by them; but the purpose of selling records like "Rockin' Shoes" was undoubtedly to sell more chocolate. H. Co. offered the appellants the statutory royalty on 1s. 6d. per record. They refused the offer, and sought an injunction to restrain the manufacture and sale of the records.

Upjohn J. accepted the contention that this was not "an ordinary retail sale with an ordinary selling price" and did not fall within the section. The majority of the Court of Appeal disagreed. They thought that this was a retail sale for 1s. 6d., and that the demand for wrappers was only a "condition" limiting the class of offerees to those who produced three of them with their money. In the House of Lords all their Lordships agreed that this was a sale "by retail." But, whereas Viscount Simonds and Lord Keith went on to agree with the majority of the Court of Appeal that the wrappers were no more than a "qualification" and not part of the consideration to be advanced by the purchaser, the majority took the opposite view and decided that they were a part of the price. In the result, therefore, the

plaintiffs succeeded on the ground that there was here no "ordinary retail price," because section 8, and the Regulations made under it in 1957, envisaged a price which was a money sum only. The minority view was put with force: the acquisition of the wrappers by offerees occurred in wholly different transactions; the "pieces of paper" were "worthless" to Nestlé's (Lord Keith); and the view that they were part of the price was "somewhat artificial" (Viscount Simonds) and "entirely unreal" (Lord Keith).

The majority, on the other hand, also appealed to the same criterion of "reality." Lord Tucker described the view adopted by the minority as "unnecessarily artificial," and Lord Reid as "quite unrealistic." Such a criterion is hardly surprising in speeches which do not refer to any judicial decisions. Past cases do not, in fact, provide much assistance on how to distinguish "conditions" from consideration; and it is notoriously difficult to set out satisfactory theoretical distinctions between bare promises of gifts subject to contingent conditions, and offers proper, *e.g.*, in regard to statements such as: "If you go to London on Monday, I will give you £10." A solution is sometimes advanced by saying that such statements are offers only if they contain a "request," express or implied, for the act in question (see, *e.g.*, Denning L.J. in *Combe* v. *Combe* [1951] 2 K.B. 215, 221). In using such terminology, however, it is important to stress that the presence or absence of a "request" is to be determined *objectively*. As usual in the English law of contract one must look to the words of the offer, not the mind of the offeror. It is suggested that differences on this matter arise in the dispute between Professor Goodhart and Professor Smith ("Unilateral Contracts" (1953) 69 L.Q.R. 99, 106), where the former rejects the "request" analysis and says: "It is enough if he (the offeror) makes the offer to the offeree; he need not also request him to accept it." To which answer can be made that the analysis does not demand a request for acceptance; it demands that if a statement is to be an offer at all (where the contract will be unilateral), it must, on its face, require, or "request," the act in question in return for the promise. Indeed, if this were not so, the offeree would not know how to accept; and in unilateral contracts acceptance and consideration are the same act.

From this point of view, the speeches of the majority in the *Chappell* case are greatly to be preferred. The minority judges both emphasise that the wrappers had no real "value" to Nestlé's. The majority, too, (especially Lord Reid) consider the question of value, concluding that the wrappers had real worth for Nestlé's,

even if only indirectly by way of advertisement; but these three speeches are even more concerned with an objective assessment of the offer and the resulting contract. "To determine the nature of the contract," said Lord Reid, "one must find the intention of the parties as shown by what they said and did." He goes on to show that if there is an offer to supply goods in return for (a) an act and (b) money, the consideration is both (a) and (b). He had doubts about whether such a transaction could properly be called a "sale"; but that point was not expressly raised in the case. Lord Somervell agreed that the wrappers were part of the consideration; they were so described in the advertisement; but however they were there described, in law they were part of it. In one pithy passage of his three-paragraph speech he stated: "It is said that when received the wrappers are of no value to Nestlé's. This I would have thought irrelevant. A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn." These words serve to insist upon the objective nature of the inquiry. If the offer requires a certain act from the offeree, it is not open to the courts to speculate about whether it has any "real value" in the mind of the offeror. Such an inquiry would approach perilously near to an investigation of motive. Provided that it is not wholly illusory, the act becomes part of the consideration because it is asked for by the offer. So here, what Nestlé's did with the wrappers was wholly irrelevant. Their offer required them: "send three wrappers and 1s. 6d."; and when they got them, they necessarily got them as part of the price, whatever their "value."

There has been a tendency recently for judges to divide what is apparently one transaction into separate parts, particularly in order to create two contracts out of one. (Compare *Mouat* v. *Bett's Motors, Ltd.* [1959] A.C. 71 (P.C.), discussed in [1959] C.L.J. 74.) It is to be hoped that the *Chappell* case will prevent the growth of a similar tendency to split up the consideration in one transaction, and call some parts "conditions," unless this is plainly the intention of both parties. One of the difficulties in regard to the useful weapon of collateral contract has been that one cannot predict when the mind of the judge will turn in that direction. In regard to similar difficulties concerning the use of "conditions," Lord Reid gave a useful pointer (subject to what was said above about "value") when he said: "Of course, one person may limit his offer to persons qualified in

a particular way, *e.g.*, members of a club. But where the qualification is the doing of something of value to the seller, and where the qualification only suffices for one sale and must be reacquired before another sale, I find it hard to regard the repeated acquisitions of the qualification as anything other than parts of the consideration for the sales."

Lastly, in view of Lord Reid's words, it is perhaps interesting to speculate whether the retail "price" would have been more than 1s. 6d. if the advertisement had said: "Yours for 1s. 6d.— 'Rockin' Shoes.' Offer open only to 'members,' that is, people who have bought 3 Nestlé bars. To prove that you qualify, send 3 wrappers with your money." Although, no doubt, the courts will now lean against such a construction, it is surely not impossible that such a stipulation could be a "condition." Lord Somervell, it is suggested, did not mean to reject such a possibility; for the courts are, to that extent, still bound by the intention of the "parties," which here, as so often, means the offer which the seller chooses to make. If this is correct, it is hard on the owner of the copyright that his rights might yet depend upon the form of an offer made by a stranger to the public.

K. W. Wedderburn.

Master and Servant—Accident Abroad—Contract or Tort—Common Employment

Matthews v. *Kuwait Bechtel Corporation* [1959] 2 Q.B. 57 is worthy of notice for two reasons. First, it settles a question of law which has remained controversial for a surprisingly long time; and, secondly, it reveals a situation in which the doctrine of common employment, to all intents and purposes, continues to apply.

The plaintiff had, while in England, entered into a contract of service with the defendants, a corporation resident in Panama. Under the contract, which was governed by English law, the plaintiff was to serve the defendants in various places abroad, including Kuwait. He began work in Kuwait, but shortly thereafter was injured in circumstances which, he alleged, involved the defendants in liability to him. He wished to bring his action in England and therefore, as a preliminary step, needed to obtain the leave of the court to serve his writ out of the jurisdiction. Leave was given, and the writ was duly served, but the defendants applied to have service set aside. From the refusal of their application by the master and the judge, the defendants appealed to the Court of Appeal.

Order 11, r. 1, of the Rules of the Supreme Court allows service out of the jurisdiction, amongst other cases, in actions based upon the breach of a contract made in England or governed by English law. It does not allow service out of the jurisdiction for a tort committed abroad. The question was, therefore, whether the plaintiff's cause of action could be formulated in contract, or whether it lay only in tort.

The writ itself alleged breaches of the contract of service by the defendants and the further formulation of the case contained in an affidavit sworn by the plaintiff alleged that it was the defendants' duty, by virtue of the contract, "to take all reasonable care by themselves, their servants or agents, to provide and maintain safe premises, plant and equipment . . . and to institute, operate and maintain a safe system of work and not to expose [the plaintiff] to any unnecessary risk of injury. . . ." The plaintiff thus sought to rely upon breaches by the defendants of their so-called "personal duties" (see, *e.g.*, *Wilsons & Clyde Coal Co.* v. *English* [1938] A.C. 57). The Court of Appeal held, after considering such modern authorities as *Lister* v. *Romford Ice & Cold Storage Co.* ([1957] A.C. 555) and *Davie* v. *New Merton Board Mills* ([1959] 2 W.L.R. 331, noted *supra*), that these duties, though they may exist in tort, are also contained in implied terms in a contract of service. *Riley* v. *Baxendale* (1861) 6 H. & N. 445, an old authority to the contrary, "goes into the limbo of lost causes" (*per* Sellers L.J.).

It is surprising that the question whether the duties owed by a master to his servant are contractual or tortious or both has not hitherto been finally settled, but the fact is that both cases and textbooks contain dogmatic assertions either that the duties lie in contract or that they lie in tort—some saying one thing and some the other (*cf.*, *e.g.*, *Salmond on Torts*, 12th ed., p. 131, and *Winfield on Tort*, 6th ed., p. 163, n. (*a*)). Yet, as Lord Simonds observed in *Lister's* case, "it is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract," and there seems no reason for holding that where there is a tortious duty and also a contract, the same duty cannot also be contained in the contract. *Winterbottom* v. *Wright* (1842) 10 M. & W. 109 may have been a bad decision, but let us not so far repudiate it as to apply it in reverse.

The Court of Appeal's decision is, therefore, to be welcomed as settling a disputed point of law, but certain problems still exist. The plaintiff in the present case was careful to rely only upon

alleged breaches of the employers' personal duties. Since the abolition of common employment, however, an employer may be liable, speaking generally, not only for the breach of his personal duties, but also for the negligence of another of his employees. Moreover, in the majority of cases, it is in practice unnecessary to distinguish with particular care between the personal and the vicarious liability. An injured workman, or rather his legal adviser, when contemplating an action against the employer, no longer has to foresee whether the court will so analyse the facts of his case as to hold that there has been a breach by the employer of one of his personal duties or whether there has merely been negligence on the part of another workman. Nevertheless, in law, the two kinds of liability are distinct—the distinction has been re-emphasised by the House of Lords since the abolition of common employment (*Staveley Iron & Chemical Co.* v. *Jones* [1956] A.C. 627)—and it is here that the present case points to a difficulty. It is easy to see that the employer's liability for breach of his personal duties can be contractual, but the same cannot be said for his vicarious liability. To hold that the negligence of one workman involves the employer in a breach of his contract with another is not only far-fetched, but contrary to what was said in the *Staveley* case.

If this is correct, an interesting situation emerges. Order 11, r. 1, permits service out of the jurisdiction in cases of English contracts, but not in cases of torts committed abroad. Moreover, a cause of action in respect of which leave to serve a writ abroad cannot be given cannot be joined to a claim in respect of which such leave can be and is given (*Waterhouse* v. *Reid* [1938] 1 K.B. 743). It will be necessary, therefore, if the present case comes to trial, and in similar cases in the future, to distinguish carefully between the employer's personal and his vicarious liability. For breach of his personal duties the employer will be liable, but for the negligence of another employee he cannot be sued. The position is thus substantially unaffected by the abolition of the defence of common employment.

It follows that in these cases the court cannot apply the ordinary law of master and servant, for this today affords the workman a remedy against his employer, whether it is the employer himself or another workman whose wrongdoing causes the injury. When it is appreciated that a further consequence of the present decision will be the trial in England of questions of fact concerning an accident which happened in Kuwait, the expediency of the result may be questioned. Without wishing to make invidious comparisons between the law and the courts of this country and of Kuwait, it may be thought that justice would have been better

served if service of the writ had not been permitted. Order 11, r. 1, is not mandatory in its terms, and convenience, at least, would have suffered less if the court had so exercised its undoubted discretion as to refuse the plaintiff leave to serve his writ.

J. A. Jolowicz.

TRUSTS—VARIATION OF TRUSTS ACT, 1958

The Variation of Trusts Act, 1958, has removed the strict limits which formerly confined the court's inherent jurisdiction to approve, on behalf of persons unborn or not *sui juris* or not yet ascertained, alterations in the terms of a trust: see [1954] C.L.J. 184–189; [1958] C.L.J. 1–3. By virtue of the Act, the court may now approve if satisfied that the proposed "arrangement . . . would be for the benefit of that person." The following reported cases, decided in February of this year, are the first-fruits of the Act.

The first was appropriately *Re Chapman's Settlement Trusts (No. 2)* [1959] 1 W.L.R. 372, where the trustees of certain trusts for the benefit of the settlor's grandchildren sought and obtained an approval which, five years before, the House of Lords (in "the case which clipped the wings of the Chancery Division"—*ibid.*, *The Times*, February 12, 1959, *per* Vaisey J.) had held that the courts had no power to give. The arrangement proposed and now approved was that two provisos, creating discretionary trusts exercisable until twenty-one years after the settlor's death for the maintenance and advancement of the grandchildren, should be revoked, with the results that each grandchild on attaining his majority could be paid his share without delay and the trust funds would escape estate duty at the settlor's death. No grandchild was yet of age, and more might yet be born. Vaisey J. made the order requested, being satisfied that the proposed arrangement was for their benefit.

A few days later the same learned judge made a similar order under the Act, this time on the application of a lady (a spinster aged fifty-three) whose parents had bequeathed substantial funds upon trusts which gave her a life interest followed by a power (apparently a general power) to appoint them by her will, but which gave her no right to any capital: *Re Rouse's Will Trusts* [1959] 1 W.L.R. 372, 374; [1959] 2 All E.R. 47, 50 (a fuller report). Here the proposed arrangement would empower her to revoke the trusts as to £20,000 of the fund and apply that part as she wished; and she, in return, was to release her power of appointment as regards another £20,000 of it—so that this would

pass on her death to her next-of-kin (who were entitled in default of appointment). The presumptive next-of-kin were *sui juris* and had themselves assented to the arrangement; so presumably the court's order of approval " on behalf of the respondents who shall constitute the class of [her] next-of-kin at her death " was obtained lest, at the time of her death, her next-of-kin might include some other person or persons. Nothing was said, seemingly, on behalf of all mankind; so perhaps the power to appoint was in fact a *special* power to appoint among her next-of-kin. [Contrast *Re Roberts' Settlement Trusts*, reported in *The Times*, February 26, 1959, where an aged settlor, who had created a charitable trust in 1958 for the benefit of the employees of certain companies, obtained Vaisey J.'s approval of the insertion of a clause precluding himself, his wife, and *any future wife* of his, from benefiting under the trust; for, for want of such a clause, section 22 of the Finance Act, 1958, had now saddled him with tax on the trust's income: there, in return, the settlor undertook to pay to any such future wife an annuity of £100. In that case, be it noted moreover, counsel for the Attorney-General (concurring on behalf of the charity) indicated that charities are not within the Variation of Trusts Act—for the reason presumably that an ordinary charity is not a " person " and, conceivably perhaps, because the Act (unlike the Charitable Trusts (Validation) Act, 1954) does not expressly bind the Crown.]

In both *Re Chapman* and *Re Rouse*, *supra*, Vaisey J. stressed the importance of establishing a uniformity of practice by hearing all applications under the new Act in open court—under the inherent jurisdiction applications of this type had been heard in chambers " behind closed doors "—unless there be special reason, such as avoiding undesirable publicity, for deciding them in chambers. He also stressed that all the persons concerned, including all interests on whose behalf the court's approval is being sought, should be separately represented by counsel (in *Re Rouse* the same counsel had appeared for trustees and next-of-kin), and that counsel should appear " in a critical mood " so that the complete picture is before the court. And he indicated that when an order is made under the Act a reference to the order should be endorsed on the probate or on the trust instrument.

Re Coates' Trusts and *Re Byng's Will Trusts*, both reported in [1959] 1 W.L.R. 375, were successful applications for widening the investment powers of trustees in order that they might invest in equities, etc. It will be observed that these two applications sought not a modification of beneficial interests (the sphere in which the Act renewed the wings which had been clipped by the

House of Lords) but merely an extension of the trustees' administrative powers. The Act of 1958 specifically applies to both, for it expressly includes arrangements for "enlarging the powers of the trustees": but it also expressly preserves section 57 of the Trustee Act, 1925, whereby the court had already jurisdiction to confer an additional power, "either generally or in any particular instance," if of opinion that it is expedient for the whole trust. These two methods of obtaining extra administrative powers differ, it seems, in that (i) under the Act of 1925 the court *confers* the power, whereas (ii) under the Act of 1958 it merely approves, on behalf of infants and the like, an arrangement which needs the concurrence also of any beneficiaries who are already ascertained and *sui juris*. In *Re Coates, supra*, Harman J. preferred to proceed under the Act of 1958 and persuaded counsel accordingly to amend the summons, originally based on the Act of 1925 alone; moreover, in spite of a recent decision by Danckwerts J. (*Re Shipwrecked Fishermen, etc., Society* [1959] Ch. 220), he doubted whether the Act of 1925 gives jurisdiction to confer more than a power to invest in *specified* investments. In *Re Byng, supra*, counsel argued strongly that it would be quicker and cheaper to deal with such matters in chambers under the Act of 1925; but Vaisey J. replied that the judges have made a rule that all cases on varying an investment clause must now be heard in open court, unless there be some special reason to avoid publicity; and he ordered that the reference, in the summons, to the Act of 1925 must be struck out.

Re Steed's Will Trusts [1959] Ch. 354 was the first unsuccessful application under the Act of 1958 and the first to be opposed by the trustees. Here trustees for sale held a farm upon protective trusts for the deceased testator's housekeeper during her life with remainder upon trust for her absolutely. She wished the protective trusts to be cancelled in order that she should become absolute owner. Her proposal involved, of course, destroying both the trust for sale and also the discretionary trusts which would arise under section 33 of the Trustee Act (*e.g.*, for her and any husband she might marry), in case she should attempt to do something which would deprive her of the income or any part thereof. An exception in the Act of 1958 specifically enables the court to give approval on behalf of such discretionary beneficiaries even where the proposed arrangement would not benefit them. Nevertheless, the court's jurisdiction under the Act is merely to approve "if it thinks fit"; and here, for certain reasons, the trustees were firmly of opinion (i) that the farm, in spite of the plaintiff's protests, ought to be sold and (ii) that the plaintiff was in need of the protection which the testator's protective trusts had created for her.

Accordingly, the trustees were unwilling to surrender to the court the various fiduciary discretions which the testator had entrusted to them. There is high authority (*Gisborne* v. *Gisborne* (1877) 2 App.Cas. 300) that the court does not interfere with a discretionary trust which its trustees are exercising, or are prepared to exercise, in a proper manner. Fortified by this principle, Harman J. held (i) that there was probably no " arrangement " here at all, within the meaning of the Act; (ii) that, even if he was wrong on the first point, the " arrangement " here was not one which he ought to approve.

With respect, the first of these two alternative reasons for his Lordship's decision should be treated with caution. The Act of 1958 applies to " any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) . . . " But nowhere does the Act say or imply that an " arrangement " necessarily presupposes a plan framed or agreed by more minds than one, or that it needs in any circumstances the concurrence of the trustees.

S. J. Bailey.

WILL—BENEFIT TO WITNESS—REMUNERATION AS TRUSTEE

The junior branch of the profession will feel some relief that in *Re Royce* [1959] 3 W.L.R. 254 the Court of Appeal have reversed the decision of Wynn-Parry J. [1959] Ch. 191.

Sir Frederick Royce had made a will appointing A and B his executors and trustees, with a clause which entitled B (who was a solicitor) or any other solicitor who might become a trustee to charge for his services. Sir Frederick's signature was witnessed by C (a solicitor) and D. The will was proved by A and B, but B later died while the trust created by the will was still subsisting, and A appointed C to be an additional trustee.

The Wills Act, 1837, s. 15, provides that a gift in a will to an attesting witness (or his spouse) shall be void. The conferring of a right to charge is a gift and falls within the section (*Re Pooley* (1888) 40 Ch.D. 1). Was C therefore precluded from charging?

Wynn-Parry J. held that he was, because " the only safe view to adopt is that if a man attests a will he should not in any way be enabled to take any benefit under that will—not even if he enters a class intended to benefit by the will after the will has been proved." The Court of Appeal unanimously took the contrary view; and Lord Evershed M.R., in delivering the principal

judgment, gave three reasons for holding that section 15 did not apply.

Most important was the language of the section itself: "If any person shall attest the execution of any will to whom . . . any beneficial . . . interest . . . shall be thereby given," the gift shall be void. This appeared to contemplate and strike at a gift made by the will at the time of its attestation, though admittedly no gift could actually take effect until the will became operative at death. At least it was clear that the gift must have been made to the witness at one of these times (it was unnecessary to decide which) by the will itself. The section had no application to a benefit resulting from an act of persons other than the testator long after his death—virtually a *novus actus interveniens*.

The second reason lay in the history of the section. The Statute of Frauds, 1677, s. 5, had required "three or four credible witnesses" for a will of land, and a witness who received any interest under the will was not regarded as "credible." If this reduced the number to less than three, the whole will failed. The Wills Act, 1752, followed by that of 1837, mitigated this effect by providing that a person receiving an interest should be a competent witness, and that only the gift to him should fail. Clearly the object of each enactment was to ensure that a testator rendered weak by age or illness should not be coerced into making a will in favour of the very person who presented it to him for execution; and this did not require the disqualification of someone who, when he witnessed the will's execution, stood to receive no interest at all under its terms.

Finally there was authority. In *Thorpe* v. *Bestwick* (1881) 6 Q.B.D. 311 a man who had witnessed a will later, though before the testator's death, married a lady to whom the will left property. Mathew J. held that this did not attract the operation of section 15 and the lady's devise remained valid; for the words in the section "or to whose wife or husband any . . . gift . . . shall be thereby given" referred only to an existing spouse of a witness at the time of attestation. Thus, if a witness's acquisition of a benefit by a subsequent marriage fell outside the scope of the section, clearly his acquisition of a benefit by a subsequent and independent appointment as trustee should likewise be immune.

These were compelling reasons for declining to extend the ambit of *Re Pooley* (*supra*). Indeed, one is prompted to ask whether that decision itself needs reconsideration. The root principle is that a trustee, in the absence of a contrary direction, must give his services voluntarily, and the court concluded in *Re Pooley* that a charging clause is therefore a gift and so falls within section

15. But is it realistic to regard the conferring on a professional executor or trustee of a right to charge as "bounty" (*per* Chitty L.J. in *Re White* [1898] 2 Ch. 217, 218)? He has to work for this remuneration; and it is "earned income" for tax purposes (*Dale* v. *I. R. C.* [1953] A.C. 11). If he is a solicitor he cannot charge more than what is "fair and reasonable" (Solicitors' Remuneration Order, 1953). Moreover, the rule has this somewhat artificial consequence: if a solicitor-executor thoughtlessly attests the will, he is entitled to employ his partner (though on a strictly independent basis) and to treat his partner's profit costs as out of pocket expenses which he can claim from the estate (see *Re Hill* [1934] Ch. 623 at 631).

It might surprise the ordinary testator who, in these less leisurely days, employs a solicitor or bank as his executor or trustee, to be told that he is making a gift by conferring the right to charge. Romer L.J. has observed that "it may well be that posterity will think that the courts went too far in holding that remuneration expressly allowed to a trustee for his services should be regarded as wholly bounty" (*Dale* v. *I. R. C.* [1952] Ch. 704, 721). But over the years the courts have consistently adhered to the principle and accepted its full implications (see *Re Thorley* [1891] 2 Ch. 613; *Re White*, *supra*; *Re Brown* [1918] W.N. 118). Consequently *Re Pooley* and its appendages are now firmly entrenched, and for the Privy Council at least "they have been treated as good law for so long a period that their Lordships are not prepared to depart from the principles therein laid down" (*Commissioner of Stamp Duties of New South Wales* v. *Pearse* [1953] A.C. 91, 113).

J. C. Hall.

LEASE—EQUITABLE TENANCY—SPECIFIC PERFORMANCE

"An agreement for a lease is as good as a lease" is a pithy but dangerously incomplete summary of the equitable principle established in *Walsh* v. *Lonsdale* (1882) 21 Ch.D. 9. It may be nearly true as between the parties to the agreement, but not necessarily between their assigns, since privity of estate will be lacking, nor, in the absence of registration as an estate contract, as against a purchaser of a legal estate. But above all, as the Court of Appeal re-emphasises in *Cornish* v. *Brook Green Laundry, Ltd.* [1959] 1 Q.B. 394, specific performance must be obtainable.

The point arose under Part II of the Landlord and Tenant Act, 1954, which protects business tenancies by statutorily prolonging them until they are either superseded by new tenancies or determined by appropriate notices to quit. The tenant may

apply for a new lease on such terms as, failing agreement, the court thinks fit. The landlord may oppose that application on various grounds listed in section 30 (1), such as his intention to occupy the premises himself when the current tenancy ends (s. 30 (1) (*g*)), but section 30 (2) precludes this latter ground if the landlord's interest in the premises was purchased or acquired within the five years ending with the termination of the current tenancy.

The defendants were lessees of Nos. 23 and 23a, Lower Belgrave Street for a term of seven years from Michaelmas, 1949. The plaintiff was their sub-lessee of No. 23 for that period less three days. Since No. 23a was used as a laundry and No. 23 as a confectioner's shop, both the defendants' lease and the plaintiff's sub-lease were prolonged by the Act of 1954 beyond September, 1956. Early in 1957 the head-lessors agreed to grant the defendants a new lease of No. 23 conditionally upon their effecting certain repairs. Before the repairs were effected or a new lease granted, the plaintiff applied under the Act for a new sub-lease of No. 23 and the defendants opposed the application on the ground of intention to occupy it themselves. The question was whether that ground was open to them—as it would be if their interest in No. 23 was the original term granted in 1949, albeit statutorily prolonged—or precluded by section 30 (2), as it would be if they had acquired some new interest under the agreement for a lease in 1957 and thus within five years of the end of the current tenancy.

The county court judge held that, despite the defendants' failure to effect the stipulated repairs, the equitable principle of *Walsh* v. *Lonsdale* required the 1957 agreement to be equated to an actual lease whereby they acquired a new interest in No. 23 within the five-year period and were accordingly precluded by section 30 (2) from relying on section 30 (1) (*g*). But Jenkins, Romer and Pearce L.JJ., in a single judgment, reversed him. At the material date, which was when they notified the plaintiff of their intention to oppose her application (*Diploma Laundry, Ltd.* v. *Surrey Timber Co., Ltd.* [1955] 2 Q.B. 604), the defendants had not repaired No. 23. They therefore lacked the ability to obtain specific performance of the 1957 agreement against the head-lessors, which was a basic requirement of the equitable principle invoked. "The *Walsh* v. *Lonsdale* principle cannot be invoked in cases where an agreement for a lease is subject to a condition precedent which remains unperformed by the proposed tenant and has not been waived by the landlord." So the defendants acquired no new interest in 1957 and were not debarred

from relying on section 30 (1) (*g*). The court approved the similar decision in *Inland Revenue Commissioners* v. *Earl of Derby* [1914] 3 K.B. 1186, where Horridge J. held that an agreement for a new lease could not be treated on the *Walsh* v. *Lonsdale* principle as an actual lease, so as to effect a surrender of the original tenancy, if the agreement remained subject to conditions unfulfilled by the tenant. The court here also rejected another argument against the defendants' ability to oppose the plaintiff's application, namely that they were neither "the landlord" nor "the competent landlord" for that purpose within section 44 (1) and the Sixth Schedule of the Act of 1954 respectively.

A question of jurisdiction also arose. As regards specific performance of agreements for leases, the County Courts Act, 1934, s. 52 (1) (*d*), limits a county court judge's equitable jurisdiction to cases of property not over £500 in value; and in *Foster* v. *Reeves* [1892] 2 Q.B. 255 the Court of Appeal held his power to enforce any other claim which depends on that equitable jurisdiction (*e.g.*, for rent under an informal agreement which it was sought to treat as a formal lease on the *Walsh* v. *Lonsdale* principle) to be similarly limited. But the Landlord and Tenant Act, 1954, s. 63 (2) (*a*), requires applications for new leases of business premises to be made to a county court judge where the rateable value of the premises does not exceed £500 even if, as with No. 23, Lower Belgrave Street, the gross value is higher. The question therefore arose whether *Foster* v. *Reeves* debarred the county court judge, when hearing the plaintiff's application under the Act of 1954 for a new lease, from determining whether or not the *Walsh* v. *Lonsdale* principle applied to the 1957 agreement so that the defendants thereby acquired a new interest within the material five-year period and lost their right to rely on section 30 (1) (*g*). Here the Court of Appeal upheld the county court judge in distinguishing *Foster* v. *Reeves*. He was not here being asked, as in that case, "to enforce any equitable right, whether to money, specific performance, rectification or anything else," but only to determine whether the defendants had such an equitable right to No. 23, as it was essential for him to do if he was to exercise the jurisdiction thrust upon him by the Act of 1954.

J. W. A. Thornely.

Criminal Law—Construction of Statute against Subject to Avoid Absurdity

Parliamentary draftsmen, if no others, may take comfort from the decision of the Court of Criminal Appeal in *R.* v. *Oakes* [1959] 2 W.L.R. 694.

Section 7 of the Official Secrets Act, 1920, provides: "Any person who attempts to commit any offence under the principal Act or this Act, or solicits or incites or endeavours to persuade another person to commit an offence, or aids or abets and does any act preparatory to the commission of an offence under the principal Act or this Act, shall be guilty of a felony or a misdemeanour or a summary offence according as the offence in question is a felony, a misdemeanour or a summary offence, . . ."

Oakes moved to quash a count in his indictment charging him with doing an act preparatory to the commission of an offence under the principal Act on the ground that section 7 created no such crime. The use of the word "and," it was argued, indicated that an act of preparation was criminal only in conjunction with one or other of the misdeeds previously set out in the section. Slade J. rejected this contention and an appeal against his decision was dismissed.

Lord Parker C.J., delivering the judgment of the court, held that Parliament had clearly intended an act of preparation to constitute a separate offence. Penalties had been specifically imposed for such acts by defence and emergency regulations in 1914, 1921 and 1939. While this would be no justification for disregarding the statutory words, where their literal meaning produced an intelligible result, the use of the word "and" instead of "or" made the whole provision unintelligible. There was no means of telling whether "and" qualified all the preceding alternatives or only the last. If it qualified "attempts" it made nonsense, because an act of preparation was something more remote than an attempt, a distinction well established at common law by 1920. If it qualified "aids or abets" it had the curious effect of eliminating, in the case of official secrets offences, the penalties imposed for mere aiding and abetting by the Accessories and Abettors Act, 1861, and was also incongruous in requiring that a person who aided or abetted another to commit an offence should also have done an act preparatory to the commission of an offence by himself. The court, therefore, read "or" for "and" and inserted a comma after the words "preparatory to." It rejected, incidentally, on grounds of elegance the amended reading suggested by the trial judge.

In connection with the incongruities produced by the text, it is perhaps worth noting that there is nothing in the section to require the act of preparation necessarily to relate to an offence by the person doing it, as Lord Parker apparently assumed. The preparatory act may relate to the offence which the accused has incited or aided or abetted another to commit. But where, for example, the inciting relates to one offence and the preparation to another, there

is a further difficulty: which offence determines whether the accused is guilty under section 7 of felony, misdemeanour or a summary offence?

It would be difficult, therefore, to dissent from the conclusion reached by the court that the draftsman had failed to give effect to the intention of the legislature. At the same time, there can be little doubt that the appellant's contention was correct on a literal reading of the section and indeed no attempt was made in the judgments to support the conviction on the text as it stands. It seems on the face of it a startling proceeding to bring an accused person within the ambit of a penal statute by what is frankly judicial amendment. Authority was found in *Att.-Gen.* v. *Beauchamp* [1920] 1 K.B. 650, where the Divisional Court upheld a conviction for publishing a newspaper which did not bear the printer's name. The relevant statute provided that every printer failing to print his name on papers intended for publication and every publisher of such papers should forfeit £5 for each copy "printed by him." The accused had printed none and argued that no penalty was prescribed for mere publication, but the court read the words "or published" into the section after "printed." Rowlatt J. said: "It is not a question of adding anything to the section, for it is quite clear what the intention was and the omission of certain words that you would expect to find there is nothing more than a faultiness of expression." The Crown relied on *Williams* v. *Evans* (1876) 1 Ex.D. 277, where section 78 of the Highways Act, 1835, had been subjected (though with some misgivings) to a similar process, and on *Salmon* v. *Duncombe* (1886) 11 App.Cas. 627, 634, where Lord Hobhouse had observed that it was a "very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law."

This jurisdiction to correct "faultiness of expression" must obviously be exercised with restraint if it is not to eliminate the principle that penal statutes should be strictly construed. It may be that this principle is in any case no longer observed with the same scrupulousness as it was when capital crimes abounded. But there is still respectable authority for adhering to the letter of the law in criminal cases. In *Att.-Gen.* v. *Sillem* (1864) 33 L.J.Ex. 92, 110 Pollock C.B. was of opinion that the well-known resolutions in *Heydon's Case* (1584) 3 Rep. 7b were inapplicable to statutes creating new offences. *Underhill* v. *Longridge* (1859) 29 L.J.M.C. 65 and *Coe* v. *Lawrance* (1853) 22 L.J.Q.B. 140 are both cases where the court refused to depart from the text, although the faults of expression in the relevant provisions are not easily

distinguishable in kind from those corrected in *Williams* v. *Evans* and *Att.-Gen.* v. *Beauchamp*. It is also to be observed that Lord Hobhouse's dictum occurred in a civil case and that none of the English cases cited in Stroud's *Judicial Dictionary* (3rd ed., p. 2010) where the court read " or " for " and " was criminal. It should be emphasised that what was done in *Oakes'* case can be done only where the text not only fails to give effect to the plain intention of the legislature but also makes nonsense. Where the words produce an intelligible result, the court cannot interfere merely because that is not the result intended by Parliament. To the criminal, at least, it must savour somewhat of paradox that he can the less easily escape his punishment the more incompetent the draftsman.

H. DE WAAL.

LIBERTY OF THE SUBJECT—MENTAL TREATMENT—STREET OFFENCES

THE concluding weeks of the parliamentary session saw the enactment of two statutes which introduced changes in the existing law affecting the liberty of the subject. The more important of these changes, that which relates to admission for hospital treatment for mental disorders, has resulted from the recommendations of the Royal Commission on the Law relating to Mental Illness. Hitherto compulsory detention in hospitals specialising in mental diseases or mental deficiency has required the authority of a magistrate, or in certain cases a court order, which could only be granted if the case for compulsory admission or detention was supported by medical evidence to the satisfaction of the magistrate or court. Apart from a motion for a writ of habeas corpus, the judicial order could not be challenged in a court of law. In future, under Part IV of the Mental Health Act, 1959, an application for treatment against the will of the patient must be based on the written recommendation of two medical practitioners. The application can be made either by the nearest relative of the patient or by a mental welfare officer. Of the medical recommendations one must be given by a practitioner, approved by the local health authority as having special experience in the diagnosis or treatment of mental disorders. The other recommendation will normally be given by the patient's doctor. Both must have personally examined the patient either together or at an interval of not more than seven days. There are a number of safeguards to ensure that the medical evidence shall be independent but, unless the admission of the patient arises out of criminal proceedings against him, there is no requirement of judicial sanction for compulsory admission. In its

place there are constituted, under Part I of the Act, Mental Health Review Tribunals, one for each Regional Hospital Board area. To this new administrative court a patient detained against his will may apply within six months of his admission or in the case of an infant of his attaining sixteen years of age. There is a similar right of appeal for patients who are received into guardianship on account of suffering from mental disorder. The composition of a Mental Health Review Tribunal consists of legal members, medical members, and members qualified by experience in administration, knowledge of social services or other suitable qualifications. The appointing authority is the Lord Chancellor, who is required to consult the Minister of Health with regard to the medical members and the members with general qualifications. He is required to appoint one of the legal members as chairman of the tribunal. The chairman is required to appoint one or more members from each of the three categories in order to constitute the tribunal. The rules of procedure are made by the Lord Chancellor (s. 124) and no doubt he will refer the draft rules to the Council on Tribunals.

The passage of the Mental Health Bill through Parliament has disclosed serious differences of opinion as to whether the existing judicial safeguard should be retained. Public opinion is by no means satisfied with medical expertise in the treatment of mental disorders. To this day it is believed that the medical practitioner receives little or no training in this subject, while the number of competent experts is still limited. However crude the existing protection which is secured by the intervention of a magistrate may have been, he has been there to ensure that the detention of the patient shall not be brought about by collusion by relatives and their doctors. On the other hand, it is entirely in accord with the modern approach to the treatment of mental disorder that this form of illness should be treated like all other disorders. Accordingly, in future, it is for the doctors and the doctors alone to decide whether hospital treatment, even if the patient objects, is the best course in his interests. But the legislature, by providing the Mental Health Review Tribunals, has recognised that there must be an adequate judicial safeguard against the deprivation of liberty even for the very sick in mind. The constitution of the new tribunals should provide a surer safeguard against possible abuse of the process by the doctors than the old requirement of satisfying a single magistrate as to the expediency of detention. Nevertheless it will be a very formidable ordeal for a patient (ss. 122 *et seq.*) to make application to such a tribunal and in practice one suspects that applications will have to be made, as is provided in the Act,

by another person in respect of the patient rather than by the patient in person. Much will depend on the approach of members of the tribunal to the exercise of this difficult jurisdiction. There would seem to be some danger lest the large number of purposes for which the rules may make provision may result in a tribunal being so hampered by rules from above as to prevent the much-needed atmosphere of informality if border-line patients, who presumably will make most of the applications, are to gain any confidence in its decisions. If in practice it proves to be necessary to brief counsel for the tribunal, it is permissible to fear that it may develop on lines which do not accord with the spirit of the general recommendations of the Royal Commission.

The Street Offences Act, 1959, contains a provision which in a sense convicts the accused before her appearance in court. For it is only a common prostitute who can be convicted of the offence of loitering or soliciting in a public place for the purpose of prostitution (s. 1). This is rather like substituting for " any person " " any burglar " in the definition of burglary. The Act contains no definition of a common prostitute and repeals other enactments where that term is used. The existing penalties for the offence of loitering or soliciting for the purposes of prostitution are made much more severe and may after the second conviction carry a sentence of imprisonment of up to three months with or without a fine of up to £25. It cannot be said that the way in which the Government has persuaded Parliament to carry out the recommendations of the Wolfenden Committee with regard to prostitution accords with the conceptions of liberty as understood by those who administer the law. Indeed, the Act itself can only be understood in the light of statements by the Home Secretary and the Lord Chancellor to the effect that chief officers of police in London and other large cities have undertaken that no woman shall be prosecuted under section 1, *i.e.*, branded in advance of conviction as a common prostitute, unless she has received at least two cautions from a constable in respect of her conduct in a street or public place and has been warned on each occasion that persistence in such conduct may result in her being charged under the section. This undertaking was, of course, to meet the criticism that any woman who attracted the eye of a policeman might be in danger of prosecution if the offence was couched in language which allowed any person, rather than any common prostitute, to be prosecuted for loitering or soliciting. But policemen are not infallible in their judgment of a woman's behaviour in public, and accordingly section 2, which was inserted after the Government had been under considerable pressure in the House of Commons, enables a woman

who has been so cautioned by a constable to apply within fourteen days to a magistrates' court for an order directing that there be no entry made in respect of that caution in any record maintained by the police of persons cautioned. If the undertaking of chief constables that every woman is to receive two cautions before being prosecuted be implemented, there is some protection against a prosecution being brought against a respectable girl or woman whose fondness for frequenting public places may have aroused a policeman's suspicion. But it is difficult to see why the authorities, who are prepared to concede that only common prostitutes shall be prosecuted, should have resisted insertion in the Act of a definition of what constitutes such a person. As the Act stands, any woman who fails to protest to a magistrates' court when she is cautioned is surely in danger, if prosecuted under section 1, of being branded as a common prostitute, even if she escapes conviction? So much for the narrow issue of how to implement the recommendations of the Wolfenden Committee that these unfortunate women should be driven off the streets. The Act does nothing to punish the customer, but it does increase the maximum term of imprisonment for those men or women who live on the earnings of prostitution.

E. C. S. Wade.

Obscene Publications Act, 1959

The law relating to obscene publications dates from a less tolerant age. Originally all matters concerning public morals came within the jurisdiction of the ecclesiastical courts. The first prosecution for obscene libel in a common law court was not until 1727. Hitherto the only statute dealing with the subject—the Obscene Publications Act, 1857—has provided a summary procedure for the destruction of obscene material, leaving the offender to be prosecuted, if at all, for the common law offence. It is nearly 100 years since the courts laid down the test for determining what constitutes obscenity.

> "Where the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall": *The Queen* v. *Hicklin* (1868) L.R. 3 Q.B. 360 at p. 371.

This test has caused difficulties which have been accentuated with the passage of time. In the relatively rare event of a prosecution for the common law misdemeanour the issue of corruption has been

one for the jury, and therefore to some extent the public is judge of whether or not a publication exceeds the requirements of the public good. For the exercise of summary powers under the Act 1857 two justices or a stipendiary magistrate are substituted for the jury. So long as the *Hicklin* test remained, there was nothing to require the publication to be viewed as a whole and no restriction on the conviction of innocent publishers, nor could the general literary or artistic merit of the publication be allowed to excuse passages which might tend to deprave or corrupt.

The difficulties of applying the *Hicklin* test are well illustrated by a series of cases which came before the courts in 1954: *e.g.*, *The Queen* v. *Reiter* [1954] 2 Q.B. 16; *The Queen* v. *Martin Secker Warburg, Ltd.* (1954) 38 Cr.App.R. 124 at 128. These cases disclosed a conflict between the view that a jury should direct their attention to the result of a publication falling into the hands of young people and the doubts of a judge as to whether literary standards should conform to the level of something that is suitable for a well brought up schoolgirl of 14. The critical question was whether an intention to corrupt public morals was a necessary ingredient. On this there has hitherto been no decision to show that it is a defence if the publication of matter prima facie obscene was for the public good as being necessary or advantageous to religion, science, literature or art, provided that the manner and extent of the publication did not exceed what the public good required.

The Obscene Publications Act, 1959, was introduced by a private member in the House of Commons. The definition now reads as follows:

> "For the purposes of this Act an article" (this includes a book) "shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it." (S. 1 (1).)

The definition has, to quote Lord Birkett, who moved the Second Reading in the House of Lords, "been transformed to cover all literate humanity." The price of the book, the place of purchase, the circumstances attending publication, are all matters to be taken into consideration before the test is satisfied. By reason of the strong feeling that there is need to suppress pornography the penalties upon those who publish, whether for gain or not, an obscene article may be severe. On summary conviction a fine not

exceeding £100 or imprisonment for a term not exceeding six months may be imposed. A person convicted on indictment may be fined an unlimited amount or sentenced to imprisonment of up to three years, or may suffer both penalties. It is the intention that the Act shall supersede the common law, which has been open to so much criticism on account of the *Hicklin* test. It is provided that no prosecution shall be brought for an offence at common law consisting of the publication of any matter contained or embodied in an article where it is of the essence of the offence that the matter is obscene (s. 2 (4)). While this would seem to ensure the burial of the *Hicklin* test by bringing all prosecutions for obscenity under the new Act, there are a number of other statutes relating to obscene publications, such as the Vagrancy Act, 1824, s. 4, the Customs and Excise Act, 1952, s. 44, and the Post Office Act, 1953, s. 11, to which the new definition does not apply until such time as the law of obscenity has been consolidated and codified.

The long title of the 1959 Act includes not only the amendment of the law relating to the publication of obscene matter but also provision for the protection of literature and the strengthening of the law concerning pornography. There is no separate definition of pornography, and accordingly the test of obscenity must be applied. Section 3 strengthens the summary procedure under the Obscene Publications Act, 1857, which is repealed. A warrant may be issued for seizure and search of premises, stalls or vehicles where it is suspected that obscene articles are kept for publication for gain. In order for the prosecution to secure a seizure and destruction order, it is no longer necessary to prove a sale. Accordingly the stocks of both wholesaler and retailer come under the summary procedure. The warrant to seize articles believed to be obscene also now empowers the seizure and removal of any documents found in the premises, stall or vehicle which relate to a trade or business carried on there. Formerly it was impossible to seize books to show the extent of the trade. It was a defect of the old procedure that the author was unable to appear before the court to show cause why alleged obscene articles should not be forfeited. Now cause against forfeiture may be shown by any person, in addition to the person summoned, being the owner, author or maker of the articles or a person through whose hands they have passed before being seized. In addition to a right of appeal to quarter sessions against an order for destruction, the making of the order may be challenged by way of case stated for the opinion of the High Court. The court has power to award costs against an unsuccessful complainant on whose information the warrant for seizure has been issued. In this way the author who exercises his right of appearing before the

court to show cause why his book should not be forfeited may, if successful in his submission, recover the cost of his appearance.

A significant change from the common law is made by section 4, which provides the defence of public good. A conviction for an offence and an order for forfeiture under the Act shall not be made if it is proved that publication of the article is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern. The opinion of experts as to such merit is admissible in any proceedings under the Act, either to establish or negative the defence. Hitherto there has been some doubt as to the admissibility of what is in reality the opinion of experts in cases of obscenity. There is no doubt that the campaign against pornography will be assisted by the new provisions for search and seizure. The other object of the Act, the protection of literature, science and art, is certainly assisted by that part of the definition which requires an article to be taken as a whole before judging whether it tends to deprave or corrupt. It is unlikely that the legislature in a matter of taste and morals can provide a complete solution which will satisfy those who would strive to the utmost for the protection of literature and those, perhaps the narrower section of the community, who are alive to the evils which flow from trade in pornographic articles.

E. C. S. Wade.

RIGHTS OF LIGHT ACT, 1959

England's bombed buildings have risen but slowly from their ashes. One result of this has been that the twenty-year period for acquiring rights of light has proved too short. Had it not been extended by this new Act, owners of property destroyed in the early part of the war and still unreplaced might have been prevented for ever from rebuilding, since their neighbours might soon have acquired rights of light for adjacent buildings by the lapse of twenty years from, say, 1940. The right to light, which used to be the most difficult of easements to acquire by prescription, has become the easiest since the Prescription Act of 1832, for all that is required is twenty years' enjoyment without interruption and without written permission. These threatening problems were therefore referred to a committee under the chairmanship of Mr. Justice Harman. The Committee soon found that the law governing claims to light had been deeply affected not only by wartime events but also by the modern law of planning, and they sought an extension of their terms of reference. The Act, which

gives prompt effect to their Report (Cmnd. 473, 1958), now makes permanent as well as temporary changes in the law.

The temporary provision is that the period of prescription for light under the Act of 1832 is extended from twenty to twenty-seven years. This applies in the case of any action begun on or after July 14, 1958 (the date of publication of the Report), and before January 1, 1963, except where the action was finally disposed of before the Act was passed. It also applies in the case of any action begun on or after January 1, 1963, in so far as the question is whether anything done before that date amounts to an infringement of the right claimed. There is thus a period of some three years within which the owners of vacant sites can take advantage of the extension of time—and, as will be seen from the next paragraph, all that they need now do is to register a statutory notice.

The Act makes a permanent improvement in the law by introducing a much more satisfactory method of contesting an incipient right. So drastic were the provisions of the Prescription Act that the only ways of counteracting twenty years' actual enjoyment were to show that it was subject to the servient occupier's written permission, or to effect a statutory interruption for a whole year. Since light is enjoyed purely passively, interrupting it was a difficult undertaking and usually meant that a screen or hoarding had to be built. Quite apart from the trouble, expense and general offensiveness of this step, a new complication had arisen: it required planning permission. And not very long ago, well within the prescriptive period now current, there were controls on building which made such structures impossible. The Committee therefore devised a scheme for the registration of statutory notices which should have the same legal results as screens or hoardings without their physical inconveniences; and this the Act carries out.

The statutory notice is registrable in the local land charges register. This is in every way preferable to registration at the central registry, since a local land charge is registered against the land by plan and not merely against the name of its owner for the time being (see [1956] C.L.J. at p. 220). In his notice the servient owner must identify the servient land and the dominant building, and specify the size and position of "an opaque structure" on the servient land to which his notice is intended to be equivalent. He can give free rein to his fancy as regards the size, for he may if he wishes rear his imaginary structure to an unlimited height. But before he can register his notice he must obtain a certificate from the Lands Tribunal to the effect that

adequate notice of intention to register has been given to all concerned, or else that the case is of exceptional urgency so that a temporary notice should be registered forthwith. When a notice has been duly registered, the access of light to the dominant building is treated as having been obstructed accordingly for one year from the date of registration, with the knowledge and acquiescence of all concerned. Thus the notice amounts to an effective act of interruption for the purposes of the Prescription Act, and prevents any right being acquired. But a temporary notice, which acts as a stop-gap where time is pressing but all the affected parties have not been discovered and notified, will expire on its specified date (unless the Lands Tribunal issues a further certificate); and the registration may always be cancelled by an order of the court. For while the notice remains effective, the dominant owner has the same rights of action as he would have had if the structure had been real and not imaginary. The court may then grant a declaration, or direct that the registration be cancelled or varied. It is also provided that such actions may be brought by anyone who would have been able to sue if his enjoyment had begun a year earlier than in fact it did. Thus the Act avoids the problems, familiar to students of the Prescription Act, of what happens when there has been enjoyment for (say) nineteen years and a day, and enjoyment is then interrupted. Under the new Act it is no longer necessary for the dominant owner to wait for precisely a year and then issue his writ: he can sue at once, provided only that the servient owner has chosen to register a notice rather than build a physical obstruction. For a dominant owner who plays his cards correctly, the effective period is not twenty years but nineteen.

The Act applies to Crown land, but it expressly preserves the Crown's immunity from prescriptive claims to light as conferred by the Prescription Act. This does at least enable the subject to take advantage of the new technique for resisting a claim to light by the Crown.

The Committee drew attention to the fact that their scheme would affect some rights where enjoyment had begun before the war (for example, in 1935), which would have been regarded as secure after twenty years, but which the extension of the period would now render challengeable. Bearing in mind that no right is secure under the Prescription Act until an action is brought, and that wartime restrictions and planning control were operative through at least part of the period, the Committee recommended no special provision for these cases, and the Act silently follows suit.

H. W. R. Wade.

DAMAGES—INCOME TAX—A MIRACLE OF ALCHEMY?

In his recent article in this *Journal*, [1959] C.L.J. 86, Mr. Jolowicz exposed a curious paradox involved in the doctrine of *British Transport Commission* v. *Gourley* [1956] A.C. 185 whereby the tax liability of a person entitled to damages is taken into account in assessing the damages so that he receives compensation for no more than he has actually lost. The learned writer pointed out, as indeed do most commentators on the doctrine, that two conditions must be fulfilled before the *Gourley* principle can apply: first, there must be an award of damages or compensation for the loss of an interest which is taxable; secondly, the compensation must itself be immune from tax in the recipient's hands. Without the presence of the former, no tax element (at least, so it is said) can arise in calculating the measure of damages; as to the latter, if the damages were themselves subject to tax, an application of *Gourley* would involve (notionally) double taxation of the plaintiff.

Hence arises the paradox: "For the purposes of Revenue law the damages received by the plaintiff were regarded as having been awarded in respect of capital loss. Otherwise they would have been taxable in his hands. For the purposes of assessing damages, however, what the plaintiff had lost was income, for how otherwise could his liability to income tax be in the least degree relevant?" (p. 91, *supra*).

In effect, *Gourley's* case and the doctrine to which it gave birth seems to run counter to the well-established principle of fiscal law that damages or compensation acquire the character of the interest they replace: the rule is that if the latter be taxable, so too will be the damages awarded in lieu and vice versa. This principle, well explained by Lord Clyde in *Burmah S.S. Co.* v. *Inland Revenue Commissioners*, 1931 S.C. 156, 159 (see p. 87, *supra*), has been applied so often and for so long that to discover its origin seems impossible.

How then did it come to be circumnavigated so as to allow a co-existence of the two conditions in *Gourley's* case? This has been judicially explained as the result of peculiar elements in the two House of Lords decisions: in *Gourley's* case, the concession by the plaintiff's counsel that the damages to be awarded would not be taxable in his client's hands; and, in *West Suffolk County Council* v. *Rought* [1957] A.C. 403, 407, the undertaking by the Inland Revenue, submitted in evidence, that they would not treat the compensation awarded to the plaintiff as taxable (see, too, *Spencer* v. *Macmillan's Trustees*, 1958 S.C. 300, at 304, 310, 316).

Could the *Gourley* doctrine be applied without these concessions on the part of counsel or the Inland Revenue Commissioners? The learned judges in the recently reported case of *Spencer* v. *Macmillan's Trustees* (*supra*) thought not. Coming independently to the same conclusion as Mr. Jolowicz, their Lordships found the paradox, without any such concessions as were made in *Gourley* and *Rought*, an unsurmountable obstacle to the application of the doctrine. *Spencer's* case concerned a contract for the purchase of share capital of a company. It was entered into by an agent acting on behalf of himself and undisclosed principals. When the sellers refused to complete the bargain, the agent brought an action for damages for breach of contract. The defenders argued that the doctrine should be applied so as to reduce the measure of damages which were, they contended, for the loss of profits of the pursuers' business of buying and selling companies.

What in Mr. Jolowicz's words was a "paradox," Lord Thomson (when *Spencer's* case was taken on appeal before the Second Division) found to be a "miracle of alchemy." He explained the defenders' dilemma as follows (at p. 316):

> "The sum sued for, in the defenders' view, is earnings of this company buying concern just as *Gourley's* fees were earnings or as *Rought's* company profits were earnings. Consequently, say the defenders, the first requisite for the *Gourley* principle is present, you have a sum of damages which represents earnings which in their earnings state would have been taxable.
>
> "The defenders then go on to say that the second requisite is also present. They cannot point to any practice as in *Gourley* or to an undertaking as in *Rought*, but with an ingenuity which one cannot but admire they claim that this sum which they have but now hailed as earnings has suffered a remarkable metamorphosis and is now transmuted into capital and so is immune from income tax."

How did the House of Lords in *Gourley* come to lend its authority to this metamorphosis? The argument behind the "paradox" and the "miracle of alchemy" turns on such axioms as in Lord Cameron's statement in *Spencer's* case, in the court below, that "*Prima facie* gains on commercial transactions can only be capital gains or income gains or profit and there is no room for a half-way house," and Mr. Jolowicz's "all . . . rights and interests are either subject to tax or not."

But cannot such words as "capital," "income," "taxable," "non-taxable," "value" legitimately bear sufficiently different

meanings to accommodate the paradox? Of course, (a) gains represent an increment either of income or of capital: there is no *tertium quid*. Of course, also, (b) gains are either taxable or not taxable: again there is no *tertium quid*. But, and this with respect is the real point, is the dichotomy in (a) invariably coterminous with that in (b)? If it is true, on the one hand, that some types of profit escape liability to tax assessment (see, *e.g.*, *Stainer's Executors* v. *Purchase* [1952] A.C. 280 and *Carson* v. *Cheyney's Executor* [1958] Ch. 345) and, on the other hand, that the value of capital assets is often governed by income, then we are near to a solution to the paradox and counsel will not have to resort to alchemy or rely on concessions to argue *Gourley*. "Income tax," said Lord Macnaghten, "if I may be pardoned for saying so, is a tax on income" (*London County Council* v. *Att.-Gen.* [1901] A.C. 26, 35). The present writer may be pardoned for pointing out that the converse (that all income is taxed or that tax is irrelevant when dealing with capital) is no more invariably true than the statement that all mortals are men.

What is suggested is that whilst both the loss and (in accordance with the principle in the *Burmah S.S.* case) the damages awarded in *Gourley's* case, and most of the cases following it, constituted capital, the tax liability of the plaintiff nevertheless was relevant in determining the measure of both. The fact that, in quantifying the value of an asset, regard is properly had to the owner's tax liability does not mean necessarily that the asset represents income and not capital. Lord Buckmaster made this point in *Glenboig Union Fireclay Co.* v. *Inland Revenue Commissioners*, 1922 S.C. (H.L.) 112 at 115 (a case in which the Inland Revenue had found it in their interest to contend that certain sums were not profits, although they had accepted and retained income tax upon them on the footing that they were). In determining whether a certain sum should be treated as capital or income, the noble and learned Lord observed:

> "It is unsound to consider the fact that the measure adopted for the purpose of seeing what the amount should be was based on considering what were the profits that would have been earned . . . there is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the test."

Strangely enough Lord Cameron in *Spencer's* case had noticed this dictum and had formulated this short answer to the paradox himself:

> "The nature of the test applicable to the measure of damages . . . is or may be of no relevance in determining the nature and quality of the sum which is arrived at when the question comes to be whether that sum itself is to be regarded as capital or income for the purposes of fiscal liability" (at 307).

In principle, therefore, it is perfectly admissible in some cases to value an asset with reference to the tax liability of the owner without prejudging the question as to whether the asset is capital or income. This approach could be applied to the *Gourley* doctrine. Indeed it has been so applied. In *Comyn* v. *Att.-Gen.* [1950] I.R. 142, an Irish case, it was held that in assessing the compensation for compulsory acquisition of the mining rights in an area of phosphatic limestone (a capital asset) the tax liability of the owner ought to be taken into account so that he is not put in any better position than before the acquisition. It is surprising, with great respect, that a decision such as *Comyn's*, which puts some sense into an otherwise paradoxical doctrine, should have been doubted by one of its authors (see Earl Jowitt in *Gourley's Case* [1956] A.C. 185 at 202). There are indeed weighty *obiter dicta* in the way of our approach (see *Rought's Case* [1957] A.C. 403 at 414, *per* Lord Morton, and at 416, *per* Lord Keith), yet these have not been taken as the last word on the subject.

On the contrary, the writer finds himself in good company. The Law Reform Committee for Scotland, which advised in favour of the *Gourley* decision, recognised the principle whereby the doctrine is to be applied where the plaintiff seeks compensation for the loss of a capital interest. This is manifestly the case in a *Gourley* situation itself:

> "The fact that damages for loss of earnings in certain cases, *e.g.*, where there is permanent incapacity, may properly be regarded as being given for loss of earning capacity may be a reason [*in the present writer's submission this is the only reason, because of the principle in the Burmah S.S. case*] why the damages awarded should be treated, for income tax purposes, as capital and not subjected to tax in the hands of the recipient. The damages must, however, be based on an estimate of the earnings which have been lost and we do not think it necessarily follows that the liability to tax which the recipient would have incurred if he had received the lost earnings should be ignored in assessing the damages to compensate him for his loss" (Cmnd. 635 (1959), para. 9).

There is English support for the view too. The argument was invoked in the judgment in *Herring* v. *British Transport Commission* [1958] T.R. 401 (followed by His Honour Judge Granville Smith in the unreported case of *Batchelor* v. *Waters*: see (1958) 108 L.J. 227). Donovan J. pointed out that *Gourley's* case did not involve

> " a claim for the loss of profit *eo nomine*, but a claim for damages for personal injuries measured by, amongst other things, the loss of profit—at least, so I interpret it. Where the claim is for loss of profit, as such, . . . then if the award has to be included when computing the recipient's profits liable to income tax, it [*sic*] obviously would not be deductible in assessing the amount of the award itself " (at 402; and see Professor W. T. Baxter in 19 M.L.R. 365, esp. at 372).

It is admitted that our argument restricts the scope of the *Gourley* doctrine. On the other hand, it sustains it. It goes to the root of the first condition of the doctrine as it is usually formulated. The doctrine in *Gourley*, in our submission, depends on the fulfilment of one condition, not two. It must be applied where the damages or compensation claimed by the plaintiff is a substitute for a non-taxable asset, the value of which happens to be governed (as the earning capacity of Mr. Gourley and the mining rights of Mr. Comyn) by the plaintiff's prospective tax liability. Since the interest lost does not attract tax, well-established principle has it that the damages awarded in lieu will not be taxable in his hands. The second condition of the orthodox *Gourley* formula is, therefore, tautologous and the paradox disappears.

S. Tucker.

LIABILITY FOR ANIMALS IN ROMAN LAW

In *Acta Juridica* [1] for 1958 there appears an article under the above title by Mr. Barry Nicholas, All Souls Reader in Roman Law, University of Oxford.[2] In it he challenges on a number of points an article by the present writer entitled " Liability in Roman Law for Damage caused by Animals," which was published in this *Journal* in 1953.[3]

The chief criticisms made by Nicholas are—

A. My view that there was no liability under any head for damage done by wild beasts which had escaped—in the

[1] A South African Journal, formerly *Butterworth's South African Law Review*, now published by the Faculty of Law, University of Cape Town.
[2] pp. 185 *et seq.*
[3] (1953) 11 C.L.J. 395.

sense of escaped from ownership [4]—is "demonstrably wrong."

B. Also demonstrably wrong is what Nicholas calls my proposition that "the action given by the Aedilician Edict lay for damage caused (a) to persons or property on a public way, (b) by wild animals and dogs and also (later) by domestic animals generally."

C. He doubts my view of the meaning of *contra naturam*.

D. Finally he doubts the accuracy of my view that in classical law the *actio de pauperie* lay only for damage done by domestic animals.

A *and* B. *Liability for damage done by escaped wild animals and the scope of the Aedilician Edict.*

There is, says Nicholas, no justification for restricting the Aedilician action to animals owned at the time of the damage. His reasoning is—

(a) The provision in the Edict is ostensibly a police regulation forbidding the "keeping" [5] of certain animals in certain places, and such a restriction would largely frustrate the obvious purpose of the Aediles. No evidence of such purpose appears, and I have not been able to find in the classics any trace of such a problem having existed. There are many references to ownership and use of wild beasts (even lions, tigers, leopards, bears, camels and elephants were sometimes yoked in carriages, we learn from Pliny, Martial, Seneca and others) but there is no mention of damage caused by such animals after escape. A likely reason is that while wild beasts might be loose, in the sense that they were not caged or chained so as to make it impossible for them to do damage, or might get loose by breaking cage or chain, they would not in law be regarded as having recovered *naturalis libertas* [6] and would consequently be considered as still remaining owned.

(b) There is nothing in Justinian's *Institutes* [7] nor in the texts cited by Nicholas [8] to restrict liability to animals which are still owned. This I venture to question. In the *Institutes* we find after a statement of the method of assessment of damages in the Aedilician action "*tanti dominus condemnetur*" and there is no

[4] "Escaped" should be interpreted as meaning "ceased to be owned." A bear can get out of its cage or slip its chain and yet be owned, not having regained its *naturalis libertas*: G.II.67.

[5] I regard Nicholas' use of the words "keeping" and "keep" as misleading. They at least suggest an element of permanence, as if, for instance, the owner stabled his beast in the street. The beast would probably be merely *in transitu*. *Habere* of itself means to own or control rather than to keep.

[6] See note 4, *supra*.

[7] IV. 9pr. & 1.

[8] D. 21.1.40.1 and 42; Paul, *Sententiae*, 1.15.2.

dominus of an escaped wild beast. If the intention was to include the *quondam dominus* the failure expressly so to do is remarkable, the more so in view of the mention in the immediately preceding paragraph of the non-actionable *quondam dominus* of an escaped bear.

(c) The rule of the Aediles is that " no one is to keep the named animals *qua vulgo iter fit* in such a way that injury or loss can result to anyone." [9]

First, if the obvious purpose of the Edict was to deal with escaped wild animals which caused damage, what was the point of limiting the liability to cases where such an animal was kept *qua vulgo iter fit*? Why should it not be an offence to keep it on private property from which it might escape onto an *iter*?

Secondly, the wording of the text—*ita habuisse velit ut cuiquam nocere . . . possit*—deals with the way the animal is to be " had " on the *iter*, such mode of " having " (not of ceasing to have) as to enable it to cause damage being prohibited. If, indeed, it was intended to apply mainly or at all to escaped beasts the rule could hardly have been expressed with less clarity and elegance.

Finally on this aspect, Nicholas says that it is essential to my thesis (that there is no liability for an escaped wild beast) that the Edict was extended to domestic animals other than dogs. This simply is not so. My thesis is that there *is* liability for *any* animal domestic or wild, and covered by the Edict, while it is owned; and a wild animal does not cease to be owned merely by being loose *qua vulgo iter fit* or elsewhere.[10] I regard Paul's addition of " *aliudve quod noceret animal* " [11] to those listed in the Edict as covering both domestic and wild beasts, the reason for the addition and original inclusion of domestic animals being to meet the likelihood of the surrender value of the animal being inadequate owing to changes in values.[12] This, I think, Nicholas would accept.[13]

C. *The meaning of contra naturam.*

There are different opinions. It may be—

(a) *Contra naturam generis, i.e.*, the *genus* of domestic as opposed to wild animals.

(b) *Contra naturam speciei, i.e.*, of the horse or dog *species* where a horse or dog is the offender.

[9] *Acta Juridica* (1958) p. 186 and texts there cited.
[10] See G.II.67 referred to in note 4, *supra*.
[11] D.21.1.41.
[12] (1953) 11 C.L.J. p. 402.
[13] *Acta Juridica* (1958) p. 186, n. 11. Incidentally I accept Nicholas' view that D.21.1.43pr. relates to *vitia* which the Aediles required to be declared by sellers.

(c) *Contra jus naturale*, which perhaps regards offenders as having in effect committed a delict.[14]

At least we are agreed that "tame animals are expected to behave themselves"[15] whichever of these views we may prefer.

D. *Did the actio de pauperie of classical law lie only for damage done by domestic animals or had it been extended to cover owned wild beasts?*

Nicholas takes the view[16] that it extended to all tame animals and to wild animals while in custody. Among the reasons he mentions are—

(a) The text of D.9.1.1.10, which after stating that the *actio* does not lie for damage done by wild animals, adds that therefore if a bear escapes its *quondam dominus* cannot be sued. This addition Nicholas terms unnecessary and misleading *if there is no liability for wild beasts in any case*, and later remarks that "the Aedilician action would lie." These last italicised words represent Nicholas' view but in my opinion that view is wrong, as I have tried to show. The purpose of the text is to show the *actio de pauperie* as appropriate only to domestic animals and to emphasise that it does not lie against the owner of a wild beast. Apparently to support his view Nicholas says[17] that I conjecture—reasonably, in his opinion—that an Aquilian action might lie against a circus owner who fails adequately to fence the animals on show.[18] Has he failed to notice that that conjecture was subject to the assumption that the wild beast was owned at the time it caused the damage?

(b) D.9.1.1.6. *Sed et si instigatu alterius fera damnum dederit, cessabit haec actio.* Why, says Nicholas, if there is no liability for wild animals, is it necessary to exclude liability in the case of incitement?—adding "'*fera*' can hardly mean anything else than a wild animal." Is this last point true? D.9.1.1.4 runs "*Haec actio* [*de pauperie*] *locum habet cum commota feritate nocuit quadrupes*" and adds examples of domestic animals with *commota feritas*. Then D.9.1.1.5 refers to the natural *asperitas* of a dog (again domestic). Later, in D.9.1.1.10 mention is made of the *naturalis feritas* of a wild beast. The texts, obviously, use *feritas* of both domestic and wild beasts, and it is submitted that *fera* in 9.1.1.6 is used of a domestic animal and relates particularly to the *commota feritas* of 9.1.1.4.

Here I rest my case.

D. I. C. Ashton-Cross.

[14] *Acta Juridica* (1958), p. 187.
[15] *Ibid.*
[16] *Ibid.*, p. 190.
[17] *Ibid.*, p. 188.
[18] (1953) 11 C.L.J. 396.

ENGLISH FEUDALISM AND ESTATES IN LAND*

S. E. Thorne †

It is fitting for a lecturer to pay his tribute to the man under whose auspices, so to speak, he lectures. That sometimes is a difficult matter, requiring the closing of an eye to many things, but in this case I am happily absolved from any such necessity, for there can be no doubt that Maitland was a man of genius. I hardly need say this in Cambridge, or in any other place where scholars come together, for his reputation has been long and securely established. It is now more than half a century since his death, and longer since his books were written, yet they are today more widely read than ever. The intensive researches of the last fifty years have made only the smallest alterations in the conclusions they reached. He himself was perhaps not quite as sure of them as we are. The most honest of men, he was always careful to reveal his doubts, and it is to a subject on which he had many doubts that I address myself today. I shall talk about the ownership and heritability of land in the twelfth century, in other words, about the emergence of the fee simple as an estate in land. I shall begin by setting before you Maitland's own account.

Maitland began by assuming that fiefs held by military service were heritable from the days of the Conquest.[1] That was universally assumed by the historians of his day and is still assumed by the most reputable, though, in the light of evidence discovered since Maitland's day, the heritability of military fiefs is now said to have been firmly established not at the Conquest but at the beginning of the twelfth century. The initial difficulty of this assumption, that Glanvill, writing at the end of the twelfth century, still knew nothing of the rules of inheritance, Maitland saw,[2] but in the face of evidence apparently making it quite clear that fiefs had descended from father to son from the beginning

* This is the first of the Frederic William Maitland Memorial Lectures given in Cambridge during February 1959. It was read again in Oxford in May. The lectures will appear in book form and I therefore have postponed any full citation of authorities, contenting myself with references to easily accessible books which may readily be consulted. It is a very pleasant duty to acknowledge here my indebtedness to the Managers of the F. W. Maitland Memorial Fund and to the Law and History Faculties of the University.

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1 Pollock and Maitland, *History of English Law* (2nd ed.), i, 314–316.

2 P. & M., ii, 293–294.

of the twelfth century at the latest, Glanvill's ignorance had to be explained in another way.[3] Having thus begun by assuming heritability, Maitland had to regard the tenant of military land as its "owner"—I use this word in its ordinary sense—for obviously one could hardly inherit from an ancestor who had held his fief only for life. But difficulties then presented themselves. The documents of the twelfth century disclosed that a tenant by knight's service was very far from being an "owner"—for example, he apparently required the consent of his expectant heirs in order to convey his land to third persons,[4] and many charters showed him securing the consent, apparently the necessary consent, of his lord as well.[5] Such requirements would seem to reduce the tenant's interest to something less than "ownership," perhaps to some temporary interest in the land only, but if so, how could one explain the heritability of fiefs which descended with regularity from ancestor to heir? The tenant had to be considered the "owner" of his fief and the limitations upon him regarded not as diminishing his "ownership" but merely as restraining his power to alienate.[6] The first restraint he found to derive from a sort of family ownership, or more precisely, to be an indication of a deeply rooted sentiment that land, even land held by military service, should descend equally to all a man's sons.[7] That is the reason their consents were required when he sought, in his lifetime, to alienate a portion to a stranger. Dealings with land, however, were few in the twelfth century, and the main purpose of the rule, Maitland said, was to restrain a father from giving one of his sons a larger portion than he could in due course expect. The second restraint, a tenant's need to secure his lord's consent to his alienations, Maitland attributed to some indeterminate right the lord had to prevent alienations which would seriously impair his interests, that is, his right to the services due him from the land.[8]

Now both these restrictions disappear in the last quarter of the twelfth century; the requirement of the heir's consent, indeed, in its last few years, for Glanvill, writing shortly before 1189, still regarded such consent as necessary.[9] Maitland was thus faced with explaining their rapid disappearance. In his view, the consent of the expectant heir vanishes because of the introduction of primogeniture. It would have been unfair to allow the eldest son to object to gifts made to his brothers when their father's land had

[3] P. & M., i, 315–316.
[4] P. & M., ii, 13, 309–311.
[5] P. & M., i, 340 *et seq.*, 345.
[6] P. & M., ii, 13, 15, 17.
[7] P. & M., ii, 309, 312.
[8] P. & M., i, 332, 343.
[9] P. & M., ii, 308–309, 311, 313.

become no longer partible but inheritable only by him. The object of the rule had been to achieve an equal division among the sons. It was unbearable that it should continue, that the eldest should be able to prevent his father's gifts to his brothers, when, if none were made, all would come to him at his father's death.[10] Thus free alienation without the heir's consent comes in the wake of primogeniture. The disappearance of any need for the lord's consent is the result of a strong bias in favour of free alienation on the part of the king's justices. "They were disposed," Maitland said, "to concede to every tenant the fullest possible power in dealing with his land."[11]

There are grave difficulties in this ingenious analysis—the partibility of the knight's fee, the late appearance of primogeniture, the so-called bias of the king's justices in favour of freedom of alienation—which must remind one inevitably, as Professor Plucknett has said, of Adam Smith rather than of the *curia regis* of the late twelfth century. Its basic flaw was the assumption that military fiefs were heritable from the Conquest or soon thereafter, which made it necessary to regard the very first tenants by knight service as "owners" of their land. I propose to show that the military fief was not heritable until about the year 1200 and that its tenant held merely an estate for life. To the alienations of such a tenant, the consents of his lord and (if the gift was to continue after his death) of his heir were naturally necessary. If that is true, we may dispense with the theory of the partibility of knights' fees, equally divided among sons, for which there is no real evidence. Ownership and its concomitant heritability will then appear about the year 1200, and with ownership the consents formerly required will fall away. No further explanation for their disappearance is necessary and we may then return primogeniture to its proper place in the late eleventh century and discard the bias of the king's court toward freedom of alienation. When the tenant had become the owner of his fief, the judges naturally were disposed to concede to him the fullest possible power in dealing with his land.[12]

Let me turn first to the heritability of knights' fees. Maitland asked the question whether the followers of the Conqueror, who received great gifts of English land, held those lands heritably, and answered, writing before 1898 and thus in ignorance of evidence to be discovered later, that it was certain that they did so.[13] Professor Ganshof, writing within the last dozen years, says,

[10] P. & M., ii, 20, 308–309, 312.
[11] P. & M., i, 344.
[12] P. & M., ii, 5, 6.
[13] P. & M., i, 314.

"in England the heritability of fiefs was not generally established in the period immediately following the Norman Conquest. The two earliest charters of enfeoffment which we possess, dating from before 1087, seem to have contemplated nothing more than grants for life, though it is worth noting that in both cases the fiefs did become hereditary. By the twelfth century, however, heritability must be regarded as characteristic of the English fief." [14] And so Professor Plucknett: "By 1100 it therefore appears that the hereditary principle was admitted by the king in favour of his tenants in chief, and by them in favour of their sub-tenants." [15] And so Sir Frank Stenton: "In view of the number of tenancies, obviously military from the beginning, which can be traced from the Conqueror's time through the reigns of his sons, there is no room for doubt that knights' fees were in fact normally hereditary from the time of the first enfeoffments." [16]

Now in truth military tenancies often did pass from father to son, from ancestor to heir, but that does not necessarily imply heritability. If I hire my gardener's son after his father's death, and my son hires his son after him, the place as gardener has descended through three generations of the same family. Yet it is obvious that it has come to each by gift, and that the son and grandson of my gardener can in no way be said to have inherited it. What we have is a fief held by successive tenants in return for service, each succeeding by gift.

In feudal theory, a fief was given to a vassal in return for his homage and service. It was to provide his maintenance and give him the means of furnishing his lord with the service due.[17] Thus, it was his for no fixed period, but only as long as the personal relationship of vassalage, the tie of homage between lord and man which constituted his title, continued.[18] When that came to an end, as it did on the death of either of the parties, his fief came to an end with it. If it was the tenant who had died, the land reverted at once to the lord. Put more precisely, land which had been the lord's all along, subject to the tenant's interest, became his free of that interest. He could take it into his hand if he so wished, expelling the heir, but whether he did so or not, his rights in it revived in their entirety.[19] By the same token, the tenant's heir had no rights in the land but merely a claim to succeed his

[14] *Feudalism* (1952), 120–121.
[15] *Concise History of the Common Law* (5th ed.), 524. But p. 360: "The assize of mortdancestor (1176) played a large part in the final establishment of the hereditary principle."
[16] *English Feudalism* (1932), 160.
[17] Ganshof, *Feudalism*, 96, 121.
[18] *Ibid.*, 38.
[19] *Ibid.*, 121.

ancestor as the lord's feudal man, that is, to have the lord accept his homage and regrant to him the fief which had supported his ancestor's service and was now to support his own. This was a relationship into which the lord was not compelled to enter, and thus the regrant of his ancestor's fief to the heir not one he was required to make. To persuade him to do so a payment, a relief, might be offered.[20] When it was the lord who had died, his tenant still alive, homage came to an end in the same way and with it the fief it had guaranteed.[21] The tenant had merely a claim to be accepted as the feudal man of the new lord who had succeeded as heir and then to have regranted to him the land he had held. For this a payment might also be offered since the new lord was in no way bound to take his ancestor's tenant as his own.[22] What from below is a succession of lords is, of course, from above a succession of tenants. The new lord (let me call him B's heir, son of the former lord B) had come to the land not by descent but by virtue of a regrant made to him by his own lord A after the fief had returned to him at B's death. Thus, he took the fief free of any gifts B had made, all such estates having come to an end with the death of their warrantor B.

The acceptance by B, after his tenant C's death, of the homage of his heir, or if it was the lord B who had died, his heir's acceptance of C's homage, was the essential element in this scheme. It was the bond of homage between them, which barred the lord from himself retaking the land and obliged him to defend it against others, that constituted the tenant's title to his holding, the warrant by which he occupied his lord's land. In the absence of homage, or on its disappearance by death, disavowal or the commission of felony, he was without a warrantor, without title, and thus without defence.

By the second quarter of the twelfth century, the lands given by the Conqueror to his barons for their homage and service had been given again, by him or by his successors, first to their sons and then to their grandsons. In the same way, the fiefs given by such lords to their men for the service of a knight or knights had come into the hands of their descendants. This devolution, it seems likely, was neither dictated by law nor accomplished by agreement between the parties.[23] It was the result of expediency. It was essential that in military fiefs there should be a constant

[20] *Ibid.*, 122.
[21] *Ibid.*, 38, 39, 42, 124.
[22] *Ibid.*, 124–125.
[23] Douglas, *Feudal Documents from Bury St. Edmunds* (1932), cii–ciii; Plucknett, *Concise History*, 524; P. & M., i, 316: "the truth is that men gave lands and took lands and left the terms of the tenure to be decided by the course of events and their own strong wills."

and unbroken succession of men responsible for service. As they were removed by death, replacements might be chosen at large, but it must soon have become evident that, from a purely practical point of view, no one was likely to be more readily available, or more acceptable to the men of the fief, or (in the great majority of cases) better prepared to undertake the duties required, than the deceased tenant's eldest son. Primogeniture, all things considered, provided the best, if not always the most perfect solution to the problem. The substitution of heir for ancestor, a practice followed independently by many lords in many cases, gradually established the general rule. For many years, however, though an heir could look forward with increasing confidence to occupying his ancestor's fief, he was far from being able to demand it as of right. And on the lord's side, his regrant to the heir long retained the character it had first had, that of a gift he might or might not make. Made, perhaps, without enthusiasm, only because of the absence of any practical alternative, as where I take on my gardener's son after his father's death, it was a gift nonetheless; it was only slowly borne in upon him that he was making a gift required by law. But whatever the Conqueror's original grants had contemplated and whatever the reasons which led to the introduction of primogeniture, by the second quarter of the twelfth century tenants by military service had come to hold their fiefs heritably. Their holdings devolved according to hereditary right.[24] But the military fief had not gone in one long jump from a holding which fell into the lord's hand at the tenant's death, thus requiring, if his heir was to have it, a gift or regrant by the lord, to one that passed to such heir independently of the lord, descending to him directly from his ancestor. That position was only slowly reached and had not yet been achieved by the third quarter of the twelfth century.

A gift by B to C for his homage and service, even one to him and his heirs in fee and inheritance, still gave C, in the first part of the century, a fief of the traditional kind which came to an end when the homage between himself and his lord B disappeared. If it was C who had died, the land he had held fell into the hand of his lord B, remaining his until he had taken the homage of C's heir and given the land to him.[25] If the holding was by knight service, this was a gift B was bound to make, but a gift nonetheless, for nothing descended to C's heir from his ancestor, whose

[24] See the charter of 1122 in Stenton, *English Feudalism*, 154–155; *Sir Christopher Hatton's Book of Seals* (1950), No. 528.

[25] This long remained true of the king and his tenants in chief: *Book of Seals*, No. 174. His position was not from the first exceptional: P. & M., i, 312, n. 2.

life estate had come to an end, and he could come to the land in no other way. For it a relief might justifiably be asked, and if a charter were drawn the verbs "*reddo et concedo*," even the verbs "*do et concedo*" proper to a new and original gift, were quite appropriate.[26] If it was B, the lord, who had died, his fief, of which C's holding was part, came to an end with his death and reverted to his own lord A. It was his until he had taken the homage of B's heir and given the fief to him. Before that had been done, if the heir, impatient of delay, entered upon the land, he was guilty of a wrongful intrusion.[27] If B's service had been military, A's gift was one he had become bound to make, but, as above, a gift nevertheless, for which a relief might legitimately be asked. After the regrant had been made, B's heir was not in by descent, his ancestor having held only a temporary estate, but, as any stranger might be, by gift. Thus, he took the holding free of the alienations his ancestor had made. With the death of B, their warrantor, the estates of his grantees had fallen to the ground. Thus, a new gift to C by his new lord was necessary. If C was a military tenant this was a gift B's heir had become bound to make, but here again, it was a gift nonetheless, for which a relief might be asked.

When it was C who had died, B was bound to regrant to C's heir if the holding was military, but only if he was of full age and on the land, ready to perform the service required. It often happened, however, that the heir was unascertained at his ancestor's death, or if known, was absent, or a minor incapable of homage and military service. Under such circumstances, where there was no one to do the service, the land had of necessity to remain in the lord's hand until such time as the heir had been ascertained or had made his appearance or reached full age. It would then be given to him in return for his homage.

By the middle of the twelfth century regrants regularly made had given tenants, whose lands had been held by their fathers and grandfathers before them, a more proprietary interest in their holdings. If the land they held was not yet wholly their own, it was no longer wholly the property of their lords; ownership was divided between them. Homage only half conferred a new title upon the tenant, half perfected a title already his. On his lord B's death C must still have his homage accepted by his new lord, but before that was done he was not entirely without right, as he once had been. And in the same way, though on his ancestor's

[26] Stenton, *English Feudalism*, 271, Nos. 24 and 25; 272, No. 26; 282, No. 43; Stenton, *Documents Illustrative of the Danelaw* (1920), Nos. 457, 518; *Book of Seals*, Nos. 50, 374.

[27] Here again the king's position is not at first exceptional: P. & M., i, 311.

death an heir had to have his homage accepted by B his lord before his ancestor's fief could properly become his, that no longer provided the sole warrant for his occupation. He had a title of a kind to his patrimony or heritage, a title prior to and independent of homage. The land was his as of right.[28] By the same token, lords had come to regard their fiefs as divided into two clearly distinguished portions: lands subinfeudated to others for military service and lands not so subinfeudated, *feudum* and *dominium*. A lord's rights in those of his lands which were in the hands of his tenants had weakened, as had their own in the lands they had themselves subinfeudated. And as their rights in the land they held in demesne had been strengthened at their lord's expense, so had his in his *dominium* at the expense of his own lord. But though his subinfeudated land was no longer his in the same sense that his *dominium* was, it had not slipped from his fingers completely, nor had his interest been reduced to that of being seised only of an incorporeal seignory. It was still recognisably his though by his gift it was presently in the hands of temporary tenants and though, after it had reverted to him at their deaths, it would in due course again be given to their heirs.

The future lay with the tenant, and here we must remember that all men were tenants except the king. In 1166 the interest of a tenant in demesne of the land was recognised by providing him with an action of his own for recovering land of which he had been disseised. He had not simply possession but "*une jouissance toute pénétrée d'éléments de droit.*" Nevertheless the lord's right remained as well. At his tenant's death the land fell at once into his hand; his rights had, in fact, been there all along; the tenant's rights had simply disappeared. There was, consequently, no reason why he might not enter upon it. He was required to give it to the tenant's heir, but until that gift had been made the heir, though of full age and on the land, could hardly be said to have his ancestor's holding, for he took nothing by descent. Technically the tenant still occupied another's land, and, if he was to have a title to it valid against his lord, his homage had to be accepted; it was that which barred the lord and provided, as long as it subsisted, the warrant for his occupation.

His lord's title was superior to the tenant's, but homage, as long as it continued, barred him from asserting it. It was along this line that legal theory began to accommodate itself to reality. Traditionally homage had disappeared with the death of either of the parties to it, but it now was regarded as continuing for a

[28] Stenton, *English Feudalism*, 271, No. 24; *Book of Seals*, No. 513.

longer time. It disappeared only when both were dead, subsisting as long as either survived.[29] Thus, when it was B, the lord, who had died, his heir when he came to the land (and if he died, his heir after him) was barred by the homage his ancestor had taken from entering upon the tenant C, who thus was guaranteed an estate for life which survived any change of lords. There was here no reversion and consequently no regrant and no relief. On C's death, however, the arrangement came to an end and his heir had to secure a new grant from B's heir.[30] And so when it was C, the tenant, who had died. If his heir was of full age and on the land at his ancestor's death, B was barred by the homage still subsisting from entering upon him, or if he died leaving an heir of full age, upon such heir. Despite the absence of actual homage between the tenant and his lord, B was barred as long as he lived. There was thus no reversion on C's death, no regrant and no relief. But on B's death the arrangement ended and C's heir had to secure a new grant from B's heir.[31] If the land was held by military service, both the above were regrants B's heir was bound to make, but he and C's heir were strangers and a new arrangement had to be entered into, through the renewal of homage or by a charter of gift. For either a relief might legitimately be asked. Homage, though preserved by a fiction, could not survive the deaths of both the parties to it and with its disappearance the tenant's title failed.

It was becoming very difficult, by the third quarter of the century, to see why, if at his ancestor's death he was of full age and ready to perform the service due, the land should not be the heir's at once, without a gift from his lord, before he had done the homage his lord was bound to accept and before he had paid his relief, a payment which no longer bore any relation to the value of the fief but had become a fixed charge reflecting the merely formal nature of the regrant for which it was the fee. The justice of this view was recognised by the Assize of Northampton in 1176. Such an heir need neither do homage nor pay a relief before having seisin of his ancestor's holding. This did not mean that he need never do homage nor pay relief nor that the lord had lost all interest in the land. It no longer reverted to him in fact, but it did so in theory; until the heir had done what was required of him both the fief and the heir were in his hand.[32] But the heir was seised of the land in demesne, the lord seised

[29] S. J. Bailey in Camb.L.J., viii, 278–280; ix, 88–93, 194.
[30] Stenton, *English Feudalism*, 159, 274, No. 31.
[31] *Ibid.*, 161, n. 2, 277, Nos. 34 and 35 (the word "*patre*" is omitted in line 5: "*de meo patre*"); *Book of Seals*, Nos. 88, 330.
[32] Glanvill, vii, 9; P. & M., i, 310.

only of an incorporeal interest. He suffered no loss since, as before, the profits of the land were his until the heir had done his homage and paid his relief. Nevertheless, there was no reversion in fact and thus no gift. The way had opened for the idea that an heir inherited directly from his ancestor.

Seisin was not heritable nor did the land descend to the heir. He was simply to have what his ancestor had held. Unless he was of full age and on the land at his ancestor's death the land still reverted to the lord, for the ancestor had held only for life.[33] If he entered before the heir he committed no disseisin, and so if he did not surrender it until required to do so by the assize he need pay no damages; indeed, since the land was his, if he wasted the tenement no damages were due to the heir. Except when the heir was of full age and on the land at his ancestor's death, therefore, if the heir was to have the land a gift was still necessary, but if the lord did not give it the sheriff would. It was thus no longer a gift in any reasonable sense; it was the heir's right. If a charter were drawn the proper words were "*concedo et confirmo*," denoting an act of confirmation, rather than the "*do et concedo*" which had formerly been appropriate; though not found earlier, charters of this kind have survived in considerable number from the third quarter of the twelfth century.[34] Homage still remained the basis of the tenant's title, but it had assumed a more attenuated form: once taken, it subsisted as long as the tenant's line continued, providing a permanent warrant for his heirs' occupation and barring the lord and his heirs from ever entering upon them.[35] The lord's interest in the land, a real and undeniable one, was not taken from him[36]; he was left his superior title; he and his heirs were simply barred from asserting it against the tenant and his heirs. The tenant had not yet become an "owner," holding in fee; he remained a life tenant only, his heirs succeeding to life estates after him, no longer by successive gifts and homages renewed but by force of the original gift made to him and his heirs and the original homage. It would soon be seen that a perpetual bar, which made the assertion of the only effective superior title impossible, made the land the tenant's own; that one who could give effectively an estate which might continue indefinitely, without the need for subsequent regrants, was himself something more than a tenant for life; and that if one could bar one's heirs from asserting their title and make them the warrantors of the tenant and his heirs in perpetuity, such heirs

[33] P. & M., i, 310–311.
[34] Stenton, *English Feudalism*, 161.
[35] Bailey in (1958) 9 Camb.L.J. 194.
[36] P. & M., i, 237, n. 1.

did not take by virtue of the original gift, which would give them each a life interest in a knight's fee for a knight's service, but took only what their ancestor left, by inheritance from him. But that we have not reached that point by 1189 is evident from Glanvill's book.

Glanvill puts this case.[37] A father, whom we shall call F, has three sons, whom in order of their birth we call A, B and C. With the consent of A, F makes a feoffment to B for his service and takes his homage. Then B dies without issue, leaving F, A and C. To whom does the land go? This is a knotty problem, a *magna juris dubitatio*, which taxes the wisdom of the wisest lawyers. Though he is not quite sure whether A or C will prevail, Glanvill is clear that F, the father, cannot take and that his claim must be rejected. Why? He cannot possibly succeed to the land, Glanvill says, because he has taken the homage of B, which will bar him. This is the origin of the rule, law until 1833, that ascendants cannot inherit, but Glanvill does not formulate, nor, lacking the power to look into the future, could he be expected to formulate that rule. Had he seen the problem in that light, how much simpler to have said nothing of homage and to have explained that an elementary rule of the law of inheritance excludes all direct ascendants of the dead man.

As long as the ancestor had only a life estate there could be no inheritance, and that he had no more seems clear. In the assise of mortdancestor the question put to the recognitors was simply whether the ancestor had been seised in his demesne and "as of his fee." Had he, in other words, held it as one normally held a fief, or had he held it as a pledge, or as a loan, or in some other way that made it evident that the land was another's? If he had held it "as of his fee" his heir was to have seisin. But to hold land "as of one's fee" in the late twelfth century meant to hold an estate for one's life to which one's heirs would succeed by force of the original gift. That is the reason why Glanvill, though he considers many exceptions to the assize, objections that could be raised to defeat the demandant, does not contemplate the exception that the ancestor had held only for life. That would seem to us the most obvious objection to the heir's claim, that his action must fail because, since his father held only for life, nothing could descend to him. But Glanvill does not see it that way, for he is thinking of succession and not of inheritance. That one's father had held only for life is no objection to the assise of mortdancestor for everyone who holds in fee to himself and his heirs holds an estate for life, to which in due course his heirs will

[37] Glanvill, vii, 1; P. & M., ii, 286, 289–291, 292–295.

succeed. The same absence of any idea of heritability may be seen in Glanvill's account of the writ of right for land brought in the king's court. The demandant makes his claim to the land as his right and his patrimony, of which his ancestor had been seised in demesne and as of his fee. He traces no descent from heir to heir into his own person, as he will have to do in the thirteenth century, but simply alleges that his ancestor held "as of fee" and that he is his heir. He is not claiming to succeed his ancestor by inheritance, but claiming a right that is his by the form of the original gift. Such is, indeed, the literal meaning of the words "to his heirs." It is not until the next century that they are taken to give the heir no rights and to mean simply that the tenant has an estate in fee simple, one that will endure as long as any heir of his is alive.[38] If so, on his ancestor's death the heir can take only by inheritance. As Bracton says, an heir acquires nothing by virtue of the gift made to his ancestor, for he is not enfeoffed with him; he takes *ex causa successionis* not *ex causa donationis*.[39] And so with the assise of mortdancestor. It will then be said that the heir is entitled to seisin because his father held an estate of inheritance, which descended to him; if he did not, the heir's claim must fail.[40]

I have been concerned so far with gifts for homage and service. If the heirs of lords and tenants alike had become bound to recognise such gifts made by their ancestors they suffered no loss. Instead of the land itself they got the service it owed. Subinfeudations for service, indeed, were required by the system. Grants made by a lord for military service were dictated by the military requirements of his fief; they were made not for the personal profit or the convenience of the grantor but for the defence of the realm. They met the permanent burden put upon the fief and thus were an assurance to his heirs who likewise were faced by the necessity of answering, with their required contingent of knights, the king's summons to the feudal array. Gifts free of service, however, were an entirely different matter. From the lord's point of view, though his tenant remained responsible for the services due from his holding, any gift that diminished the estate charged with those services, or to put the matter in more modern form, any gift that depleted the assets of the tenant's fief while its fixed charges remained constant, made defaults on his part more likely. From the heir's point of view, to expect him to bear the burden of services when he succeeded only to an estate substantially diminished by his father's generosity was to expect

[38] P. & M., ii, 13, 329.
[39] *Ibid.*, ii, 14.
[40] *Cf.* van Caenegem, *Royal Writs in England* (Selden Soc.), 322.

the impossible. On the other hand, some gifts free of services, particularly gifts to the church in free alms, were impossible to deny. The problem thus raised was a fundamental one, necessitating the reconciliation of two equally strong and conflicting claims. We may well imagine the many anxious meetings at which such matters were discussed. It is indeed no accident that the great majority of twelfth-century charters which show a lord acting in the presence of, and with the advice of, the men of his barony are concerned with gifts of land in free alms.[41]

In the twelfth century the tenant was in no sense the "owner" of his holding; he at first held land which was more his lord's than his own, then land the ownership of which was divided vaguely between them. Thus, his lord was at first the real donor, and later, if a valid gift was to be made, he had to join with his tenant in making it. If the lord's co-operation was to be secured, it was essential that any gift to the church, free of services, be reasonable. A gift of a very large portion of the tenant's holding was out of the question. A gift that was small, however, or one that was reasonable in the light of the fief's extent and resources, was possible, for there was a good deal of play in the joints of the average fee. What was needed was a judgment by the lord, often by the lord and his men, that the land which remained in the tenant's hand was sufficient to bear the burden fixed upon it, and thus that the total service owed by the lord would not be jeopardised. Giving land free of service when the grand object was to mobilise it for service, especially military service, was a difficult and dangerous matter.[42]

Such a gift was good without the heir's participation; the ancestor was the warrantor of his donee's estate, but with his death it came to an end. The heir, since he did not inherit from his ancestor, took the land free of any alienations his ancestor had made; if they were to take effect again a new grant by him was necessary. Gifts his ancestor had made for military service, for the defence of the realm, he was required to continue, but not those of other kinds unless he desired to do so. Gifts to the church fell into this category, but since they were prima facie reasonable and made for excellent and necessary purposes they were frequently renewed.[43] Certainly the monks would endeavour to see that he did so renew them, and that his heirs did so after him, for they succeeded to the fief in the same way that he had.[44]

41 P. & M., i, 346; Stenton, *English Feudalism*, 89–90.

42 P. & M., i, 340–343. Maitland did not distinguish sufficiently between gifts for service and gifts free of service; he saw the problem only in general terms: the tenant's capacity to alienate.

43 *Book of Seals*, Nos. 107, 196, 199, 218, 354, 413, 507. 44 *Ibid.*, Nos. 518, 519.

Piety, simple or filial, usually made the monks' task an easy one, but to make the matter more certain the donor might solemnly order his heirs to respect his gift,[45] or set his curse on the head of any future heir who should attempt to destroy it. That was the function of the anathema clause, not uncommon in twelfth-century charters of gift to religious houses.[46] After the third quarter of the century the heir's charter becomes less a new grant and more a confirmation, the verb "*confirmo*" rather than "*concedo*," for reasons that will become plain in a moment, becoming ever more usual.

The best and most common method of binding one's heir, though it bound only the immediate heir and not his successors, was to have him join in the gift,[47] or secure his consent at the time the gift was made.[48] A great number of charters supply examples of expectant heirs joining in their ancestors' gifts.[49] It was not enough simply to secure the consent of the grantor's eldest son, for one could never be sure that he would in fact be the heir. If he consented and did succeed he could not afterwards complain; but if he died before his father his consent would not bar the actual successor. Thus an abbot, who could not get the consent of the donor's eldest brother, took the consents of his other brothers and of all his other kinfolk, but the eldest brother died in the donor's lifetime and his sons brought suit for the land—a suit the monks were glad to compromise. In some charters the heirs are put before us not merely as assenting to, but as joining in the gift: it is a gift by a man and his heir. In other cases the heirs are simply named among the witnesses. In all, however, there is every indication that actual consent was given: the names of each are supplied, and it is often said that they were present, witnessing and agreeing. But after the first half of Henry II's reign, in the third quarter of the century, the names disappear as does even the notation of consent.[50] Charters simply say "I and my heirs will warrant."

Now the mere use of the word "warrant" by a grantor, even the incorporation into his charter of the statement that he and his heirs will warrant, would earlier have had no special power to bar his immediate heir, to say nothing of his later ones. It is at this same time that we find the appearance of the rule that homage once taken will descend upon the donor's heirs, binding

[45] *Ibid.*, Nos. 153, 507, 510.
[46] P. & M., ii, 329, n. 2; Stenton, *Gilbertine Charters*, xxxiii; Douglas, *Feudal Documents*, 179; Stenton, *English Feudalism*, 37–39.
[47] Stenton, *English Feudalism*, 278, No. 36; 279, No. 38; *Book of Seals*, No. 143.
[48] *Ibid.*, 284, No. 46.
[49] P. & M., ii, 309–311.
[50] Stenton, *Gilbertine Charters*, xix, xxix; *Book of Seals*, No. 196n.

them to warrant the land to the donee and his heirs as long as they continue. These twin developments enabled tenants to bar their heirs from recovering lands they had alienated, but note that they are barred by the homage that descends upon them when their ancestor has given land for homage and by the express warranty that descends upon them when he has given land free of service. Nevertheless, we are moving rapidly toward ownership and heritability. The homage and warranty bars will soon be seen to be but partial expressions of principles that encompass them both. It will no longer be the homage and the warranty which bar an heir from succeeding to something to which he has a right; rather he has a right to nothing except what his ancestor leaves. By the same token, an ancestor can dispose of his land permanently not because the homage he has taken or the warranty he has given will bar his heirs, but because he has become, as he is in Bracton, the *verus dominus*, the real lord, the true owner of the land.[51]

This development may be dated within narrow limits. Glanvill does not yet accept it but it has been achieved by the early thirteenth century. The old distinction between conquest and heritage still finds a place in his book; a man may dispose of land he has acquired with greater ease than he may his patrimony. His patrimony he does not yet wholly own.[52] He may give a certain part of it with his daughter in (free) marriage, a certain part (free of service) as a reward to retainers, and a certain part to the church in free alms. If these are reasonable gifts, made with reference to the service due and the size and resources of his fief, they are good. But a father may not give any part of his heritage to his younger sons without the consent of the eldest. What this had once meant was that the heir must warrant the first gifts, that is, recognise them when he had succeeded to his ancestor's entire holding, even though they had been good only for his ancestor's lifetime; but that, when the fief had come into his hand free of his ancestor's gifts, he need not recognise a gift made to a younger son unless he had earlier consented to it. This was reasonable enough, for fathers were not often tempted to make gifts to strangers but had always been anxious to provide for their younger sons, and if the heir was to have a fief large enough to support the service fixed upon it such gifts must be made with his consent, otherwise he need not recognise them. Glanvill is puzzled by this, for if a father may make gifts to strangers without his eldest son's consent such persons are better off than legitimate younger sons. He is thinking of the father as the " owner "

[51] P. & M., ii, 4–6.
[52] *Ibid.*, ii, 308–309.

of his holding, not as a life tenant, all of whose gifts end with his death. Thus, he can no longer see why the heir's consent is necessary and provides a foolish explanation. The tenant was indeed becoming the "owner." In 1225, a son trying to get back a tenement his father had alienated, plaintively asks whether he could give away all the land he held by military service without retaining any service to himself and his heirs. His point is unavailing.[53] Bracton knows nothing of—or rather, having Glanvill's book before him, deliberately ignores—the old restraints; they are too obsolete to be worth a word. A tenant who holds in fee has become the owner of his fief, he may dispose of it all without consulting his heir, who takes only what his ancestor leaves, no more and no less.

But if a tenant may give away his land free of service and if his heir takes only what he leaves, no longer the fief free of his ancestor's alienations, gifts good only for his lifetime which required the heir's consent if they were to continue, how can the heir perform the services due? He cannot. By the late twelfth century it had already become impossible for the Crown to insist upon the production by the tenant in chief of the full contingent which he had recognised in the eleventh and early twelfth centuries. Since the heir's ability to control such alienations had disappeared, as had the lord's, the only means available were private agreement[54] and legislative fiat. Thus the Great Charter of 1217 provided that a man shall not give so much of his land (free of service) that he may not sufficiently do to the lord of the fee the service that pertains to that fee. This was unavailing. In 1258 the Petition of the Barons complained that men of religion have entered their fees without their consent. In 1259 the Provisions of Westminster declared it unlawful for religious men to enter into the fees of anyone without the licence of the chief lord of whom the thing is immediately held. But this did not end the matter and we finally have Edward I's Statute of Mortmain in 1279.

I must return to say a word about the disappearance of the need for the lord's consent. As you have seen from the statutes I have just quoted, his consent to his tenant's alienations, even to those in free alms, had become unnecessary by the thirteenth century. Indeed, it had become unnecessary by Glanvill's day, for he nowhere says or implies that a tenant may not alienate without his lord's consent. As long as his tenant had held only a life estate the lord's interest in the land had been evident. It was his, though temporarily in the hands of another. And so, though his tenant

[53] *Ibid.*, ii. 311.
[54] *Book of Seals*, No. 455; *Curia Regis Rolls*, viii, 138–139.

held it, it was his fee and consequently his consent or his confirmation that was the essential of any gift attempted by his tenant.[55] But as the tenant's proprietary interest grows, the lord's interest becomes incorporal. He has a right to the services for which the tenant is enfeoffed, he is seised of a seignory, of the homage and service of his tenant, but no longer of the land; the tenant is seised of that, he is seised in demesne, he is its owner. Similarly, what the tenant holds is no longer his lord's fee but his own. As an *addicio* to Bracton, written after the middle of the thirteenth century, says, when the lord's tenant B has alienated a portion of his land to another, who has entered into it, that other has not entered into the lord's fee, but into B's, for the lord has nothing in B's fee except his service. The fee of the lord, in truth, the writer adds, is this: homage and service and not a tenement in demesne. Only one who enters into his homage and service does him an injury, not one who enters into the tenement his tenant holds in demesne. Indeed, we have come full circle, for it is the lord whom Bracton uses to illustrate his statement that one who has no interest in the land cannot give it effectively. If a lord who has a tenant in demesne attempts to give the land to a stranger, the donee gets nothing. Thus we reach a logical position—one who has no interest in land need not consent to its alienation.

To sum up: by the end of the twelfth century one who holds to himself and his heirs is no longer a life tenant but the *verus dominus*, the real lord of the land. As such he no longer requires the consent of his lord or of his heir in dealing with it and thus restraints formerly existing fall away. There is no need to postpone primogeniture until this late date to explain their disappearance nor any need to postulate a strong bias on the part of the king's justices in favour of freedom of alienation, which is quite illusory. When he has become the *verus dominus* his heirs inherit from him; they no longer take by successive gifts from the lord and his heirs. Thus the heritability of land, which can hardly exist when the ancestor is a life tenant, then first appears—not in 1100 but very much closer to 1200. That the common law had already taken form, and that Glanvill's book had already been written, before the emergence of the heritable fee simple, when a life tenancy was the largest possible estate, explains a great many of the common law's anomalies: the curiously strong position of the life tenant, the maritagium, seisin of a free tenement as the touchstone of real property law, the absence of any outcry against reliefs until the thirteenth century, and many others. I shall treat of these matters in my succeeding lectures.

[55] P. & M., i, 345.

SIMILAR FACTS AND *ACTUS REUS*

R. N. Gooderson

Some of the complexity of the English rules of evidence in criminal cases springs from a clash, probably dating back to the formative period of those rules, between two objects, laudable in themselves but antagonistic. One most fundamental principle, of which English lawyers are justly proud, stemming from a desire that a criminal trial should be conducted in a manner as fair to the accused as possible, was that evidence of his misdoings on other occasions should be prima facie inadmissible. On the other hand, courts of justice naturally desire that cogent and weighty evidence that the accused committed the crime with which he is charged should not be excluded from consideration by judge and jury, and consequently evidence, often called similar fact evidence, of other misconduct of the accused is sometimes receivable not because it shows his bad character but in spite of that fact.

Where to draw the line in particular circumstances when these two principles conflict has been a problem productive of a great mass of case law, and there has been a recent addition to it in the case of *R.* v. *Chandor.*[1] There the Court of Criminal Appeal quashed the conviction of a Croydon schoolmaster on five charges of indecent assault upon three of his pupils, on the ground of misdirection by the trial court. The five charges covered a period of just over two years. Some of the incidents were alleged to have taken place in Croydon, some in the Lake District. The three alleged victims were boys aged between thirteen and fifteen years. The learned recorder in the trial court had told the jury that there was no corroboration, and had warned them of the danger of convicting,[2] but he went on to cite a passage from the judgment of Lord Goddard C.J. in *R.* v. *Campbell.* The latter case concerned similar charges against a schoolmaster of indecent assaults upon boys aged ten, but some of the children called as witnesses testified that they had seen assaults on other children. In the concluding paragraph of his judgment, Lord Goddard dealt, however, with the situation where, as in

[1] [1959] 1 Q.B. 545.

[2] Corroboration was required by a rule of practice, both because the evidence was of young children, and also because of the nature of the offence: *Coulthread* (1933) 24 Cr.App.R. 44. The judge was bound to warn the jury of the danger of convicting, but they would be at liberty to ignore the warning.

Chandor's case, the evidence of each child related only to the assault upon himself, and the learned recorder quoted this passage which runs as follows: "In such cases it is right to tell a jury that because A says that the accused assaulted him, it is no corroboration of his evidence that B says that he also was the victim of a similar assault though both say it on oath. At the same time we think a jury may be told that a succession of these cases may help them to determine the truth of the matter provided they are satisfied that there is no collaboration between the children to put up a false story. And if the defence is one of innocent association by the accused with the children, the case of *R.* v. *Sims*[3] . . . shows that such evidence can be given to rebut the defence."[4]

Rupert Cross, in his admirable book on Evidence, has explained that it is difficult for the jury to appreciate that evidence which is not corroboration because it does not implicate the accused in a material particular, may yet go to show that the other prosecution witnesses, testifying to the assaults upon them, are speaking the truth.[5] Some remarks upon these lines might have been expected from the appellate court, perhaps coupled with an order quashing the conviction on the ground that in the circumstances the learned recorder should have exercised his discretion to exclude the evidence as having little weight, but creating great prejudice.[6] The appellate court adopted, however, a much less cautious and highly controversial attitude by denying that the evidence of other alleged victims had any relevance. Chandor's defence was that the incidents never occurred at all. As to the Lake District incident, he denied ever having met the boy there. The court held that evidence of a succession of incidents has no relevance to determine whether a particular incident occurred. The court conceded that such evidence may properly be admissible to prove identity, intent, guilty knowledge or to rebut a defence of innocent association. With regard to the rebuttal of a defence of innocent association, the court observed that in the case of a schoolmaster and his pupil there may be nothing suspicious that calls for explanation.

[3] [1946] K.B. 531.

[4] [1956] 2 Q.B. 432, 438.

[5] p. 142: the same learned author develops the point in (1959) 75 L.Q.R. 333, 343–345. In Scotland this particular difficulty does not arise, as similar fact evidence consisting of single witnesses as to independent acts is admitted only if their evidence affords material for mutual corroboration: *Moorov* v. *H.M. Advocate* (1930) J.C. 68; W. J. Dobie in (1946) 58 Jur.Rev. 201.

[6] The existence of this discretion in cases on similar fact evidence was recognised by the House of Lords in *Harris* v. *D. P. P.* [1952] A.C. 694, and the conviction quashed because the trial judge had failed to exercise it. It should be exercised where the evidence is prima facie admissible, but of little weight, and highly prejudicial to the accused. A recent consideration of this discretion is in *R.* v. *Cook* [1959] 2 All E.R. 97, a case on the Criminal Evidence Act, 1898, s. 1, proviso (*f*) (ii).

Both the finding of the court that the evidence of other offences was not admissible to prove the *actus reus*, and the *obiter dictum* that a schoolmaster charged with an offence against a pupil has to plead innocent association, and thus lay himself open to proof of other offences, only if the circumstances are suspicious, have far-reaching implications in the law as to the admissibility of similar fact evidence. It is proposed to examine the present state of the law, first regarding the admissibility of similar fact evidence to prove the *actus reus*, and secondly as to the extent that the prosecution is permitted to anticipate a defence of innocent association or any other defence by proving such evidence to rebut it.

In any criminal trial, the three main questions that arise are: first, whether there was a criminal act, or, as it is often called, a *corpus delicti* or *actus reus*[7]; secondly, whether the accused was the author of it; and thirdly, whether the accused had the necessary *mens rea*. There was certainly a time in the development of the English law of evidence when proof of other offences was more readily received to prove the third element in criminal liability, the *mens rea*, than the first two, which relate to the *actus reus*. This is clearly evidenced by the treatment of similar fact evidence in the first edition of Halsbury's *Laws of England* in 1910. It was there stated that in the first two instances there was a general rule of exclusion, qualified by exceptions, but in the third case a general rule of admission, qualified by certain exclusions.[8]

I know of no English case where this approach in Halsbury has been adopted, but it was expressly founded on the judgment of the New Zealand Court of Appeal in *R.* v. *Thomas Hall* (1887).[9] Hall was charged with the murder of C. by antimony poisoning. The prosecution sought to prove that a few months later Hall had attempted to murder his wife in the same way, but the court rejected this similar fact evidence on the ground that such evidence was

[7] The term *actus reus* is in common use in this sense. It is doubtless derived from the famous maxim *actus non facit reum nisi mens sit rea*, but does not really form part of it. The word "*reum*" is an adjective with "*hominem*" understood as the object: Kenny, *Outlines of Criminal Law*, 17th ed., 14, n. 3. The maxim, therefore, indicates that an act does not make a man a criminal without *mens rea*; there is no reference to *actus reus* at all. In some circumstances the phrase *actus reus* is rather misleading, since in the case of an equivocal act it cannot be ascertained whether it is *reus*, until *mens rea* has been established.

[8] Vol. 13, p. 450, para. 625. This was substantially repeated in the 2nd ed. (1934), Vol. 13, p. 567, para. 639, and in the 3rd ed. (1956), Vol. 15, p. 291, para. 527. In the volume on Criminal Law and Procedure, it was stated in the 1st edition that similar fact evidence was admissible "to show not that the defendant did the acts which form the basis of the charge, but that, if he did such acts, he did them intentionally and not accidentally, or inadvertently, or innocently, or that they formed part of a system": Vol. 6, p. 381, para. 742. This statement that the evidence was admissible only to prove *mens rea* was repeated in the 2nd ed., Vol. 9, p. 186, para. 270, but omitted in the 3rd ed.

[9] 5 N.Z.L.R. 93.

admissible only as proof of intent, when the prior fact of administration had been sufficiently established by independent testimony. To reach this decision, the court had to distinguish two earlier English poison cases, *R.* v. *Geering* [10] and *R.* v. *Garner.*[11] In each case a member of a family who did the cooking was charged with murdering another member of the family by arsenic poisoning. In the *Garner* case the evidence was as to the death of another member of the family from arsenic nine months before. In the *Geering* case the prosecution tendered evidence that within a year three other members of the household had also died from arsenic poisoning. The report does not indicate what was the defence raised by the accused: the headnote says that the defence was accident. If this be so, the evidence was admitted to prove *mens rea.* If this was not the defence, the evidence might have been admitted to prove either or both parts of the *actus reus.* The first part of the *actus reus* is described by the court in *R.* v. *Hall* as the general and abstract question whether a crime has been committed, and the second as the particular and personal question whether the accused was the author of it.[12] It is possible that the similar fact evidence in *Geering* was admitted only on the first part of *actus reus,* to prove the *corpus delicti,* the number of deaths from this poison negativing that the deaths were accidental: it was more probably admitted to prove that Geering administered the poison. In any event, the New Zealand court will have none of this distinction: it refuses to admit the evidence for either purpose.[13] It is no doubt better to rule either that the evidence is admissible to prove both parts of the *actus reus* or neither, as no jury will be capable of giving weight to the evidence on the first issue whether the death was accidental, without also allowing it to weigh with them on the second issue whether the accused was the poisoner, as the jury knows full well that it was the accused as the cook who had the best opportunity to administer poison in each case, even though the prosecution proves the other deaths in the family from poison as anonymous acts, and does not stress the fact that the accused was likely to be the author of them.

The threefold division of the subject in Halsbury, with a general rule of exclusion in the first two categories, the sphere of *actus reus,* and a general rule of admissibility in the third category, that

[10] (1849) 18 L.J.M.C. 215.
[11] (1864) 3 F. & F. 681; 4 F. & F. 346.
[12] 5 N.Z.L.R. at p. 103.
[13] The judgment acknowledges that in arson cases there *is* a general and abstract question of "design or accident" that arises, which is separable from and precedes the particular and personal question of the authorship of the crime: *ibid.* The reasoning is obscure as to why similar questions did not arise in the case before the court.

of *mens rea*, has been ignored: controversy has centred round the 1894 Privy Council case of the *Makins*, the Australian baby farmers.[14] There counsel for the Makins submitted that the general rule as to similar fact evidence was one of exclusion, subject to exceptions, while counsel for the Crown contended that such evidence was generally admissible. The judgment of the Board did not clearly indicate which of these two views merited judicial approval, and from the ambiguity sprang a controversy still not resolved today.[15] For some years the matter lay dormant, although in the New Zealand case of *Rogan* (1916),[16] Sir John Salmond, then Solicitor-General, in his learned argument for the Crown, clearly explained the two possible interpretations of *Makins'* case: either that the evidence was admissible if relevant to the charge otherwise than by merely proving the accused of bad character, or that the evidence was admissible only to rebut some defence otherwise open. Salmond naturally argued that the first interpretation, of a general principle of admissibility and not merely of a specified number of excepted cases, was correct. He argued that it had been adopted in the recent cases in England.[17] The first academic writer to champion the first interpretation was Julius Stone, who in 1933 published an article affirming that historically this interpretation was the original rule.[18] He dubbed the alternative view the spurious rule, and in this and a later article on the position in the United States laid at its door various false principles to be found in similar fact authorities, including the one now under examination that such evidence cannot be used to prove the *corpus delicti*.[19] The view of Julius Stone was adopted by the Court of Criminal Appeal in 1946 in *R.* v. *Sims*[20] in a judgment delivered by Goddard L.C.J. but prepared by Lord Denning. It was rejected by the Privy Council in *Noor Mohamed* v. *R.*[21] Lord Goddard himself resiled from it in *R.* v. *Alfred Hall*,[22] but the House of Lords

[14] [1894] A.C. 57.

[15] Another important ambiguity in the case is whether the evidence was admitted to prove *actus reus* or *mens rea*: Turner and Armitage, *Cases on Criminal Law*, 2nd ed. (1958), 464.

[16] 35 N.Z.L.R. 265.

[17] (1916) 35 N.Z.L.R. 265, 275. He relied upon Channell J., delivering the judgment of the Court of Criminal Appeal in *R.* v. *Fisher* [1910] 1 K.B. 149, 152, in a passage subsequently quoted by Bankes J. in *R.* v. *Rodley* [1913] 3 K.B. 468, 472, and by Reading L.C.J. in *R.* v. *Kurasch* [1915] 2 K.B. 749, 754, in each case delivering the judgment of the same court. One of the clearest contemporary authorities the other way is *R.* v. *Bond* [1906] 2 K.B. 389, Court for Crown Cases Reserved: the facts of the case are mentioned in n. 84, *infra*.

[18] 46 Harv.L.R. 954.

[19] (1938) 51 Harv.L.R. 988, 1018.

[20] [1946] K.B. 531.

[21] [1949] A.C. 182, 194.

[22] [1952] 1 K.B. 302, 306.

in *Harris* v. *D. P. P.* left the question entirely open, although even counsel for the Crown showed antipathy to Stone's view.[23]

For the purpose of this article, the most useful analysis is that adopted in Halsbury, dividing the subject into the threefold classification of proving the *corpus delicti*, proving that the accused was the author of the crime, and finally his *mens rea*.[24] The question of *mens rea* will not be discussed, but the first two matters, concerned as they are with *actus reus*, will be expanded. Each can readily be divided into two main situations as follows:

Case 1. To prove the occurrence of the main fact, the *corpus delicti*.

(a) Where the accused denies the *corpus delicti*, and avers he himself had no opportunity to commit the crime. The leading cases under this head are *R.* v. *Alfred Hall* and *R.* v. *Twiss*.[25]

(b) Where the accused denies the *corpus delicti*, but admits opportunity—a plea of innocent association. The leading cases are *D. P. P.* v. *Ball*, *R.* v. *Smith*, *R.* v. *Cole*, *R.* v. *Sims*.[26]

Case 2. To prove that the accused was the author of the crime.

(a) Where the accused admits the *corpus delicti* (or it is otherwise independently proved), but denies opportunity, *e.g.*, by pleading an alibi. The leading cases under this head are *Thompson* v. *R.* and *R.* v. *Robinson*.[27]

(b) Where the accused admits the *corpus delicti* (or it is otherwise independently proved) and also opportunity, but denies that he committed the crime. The leading cases under this head are *R.* v. *Straffen* and *Harris* v. *D. P. P.*[28]

(Note: If the accused denies the *corpus delicti*, but admits the external act, pleading accident or innocence, the question is then substantially one of *mens rea*, and will therefore not be considered here.[29])

[23] [1952] A.C. 694, 701.

[24] n. 8 (*supra*).

[25] *Hall*: n. 22 (*supra*); *Twiss* [1918] 2 K.B. 853.

[26] *Ball* [1911] A.C. 47; *Smith* (1915) 11 Cr.App.R. 229; *Cole* (1941) 28 Cr.App.R. 43; *Sims*, n. 20 (*supra*).

[27] *Thompson* [1918] A.C. 221; *Robinson* (1953) 37 Cr.App.R. 95.

[28] *Straffen* [1952] 2 Q.B. 911; *Harris*, n. 23 (*supra*).

[29] This may be illustrated from *R.* v. *Alfred Hall*. Hall was charged with acts of gross indecency with three men, Bowden, Chapman and Ritchie. H.'s defence as to R. was that he had never seen the man. It is a leading authority on case 1 (a); see n. 25 (*supra*) and n. 53 (*infra*). As to B. and C., H. admitted the acts alleged, but pleaded that they were done as medical treatment. H. was not a qualified doctor, but if his defence was established it would rebut any suggestion of indecency. It was a case where the *actus* was equivocal, and could not be dubbed *reus* until the vital question of *mens rea*, the only question in issue, had been decided (see n. 7, *supra*), and it was on this issue that the similar fact evidence was tendered.

Cases 2 (a) and 2 (b) will first be disposed of, and then cases 1 (a) and 1 (b), the situations at issue in *R.* v. *Chandor*, will be treated, but as a preliminary the case of *D. P. P.* v. *Ball*[30] will be discussed. This was a case of type 1 (b), but deserves special attention as it is believed that it was the decision of the House of Lords in this case, reversing that of the Court of Criminal Appeal, that finally destroyed any argument that similar fact evidence could not be used to prove the *actus reus*. The question was whether the relationship between a brother and sister, living together, was incestuous and therefore criminal, or innocent. The House of Lords held that evidence that a child had been born to them two years earlier, nine months before the Punishment of Incest Act, 1908, had made incest a criminal offence, was admissible. The court expressly state that the evidence is not to prove *mens rea*. It is clearly used to establish *actus reus*, since the act is unequivocal, and once this is proved there is no need to prove intent.

This decision should prompt a reassessment of an old line of cases that similar fact evidence cannot be used where the act is unequivocal. One of the earliest ones that still appears in full glory in as modern a book on Evidence as Nokes is *R.* v. *McDonnell*.[31] There M. was indicted for demanding money with menaces. P. testified that M. threatened to charge him with indecent assault unless he gave him a sovereign. The prosecution wished to call a witness to prove a similar threat by M. against another person two years before, urging that it was a question of intent. Erle J., rejecting this evidence, said that if P. was believed the intent was quite manifest, and it was unnecessary to call other witnesses to confirm it. Julius Stone does not refer to this case, but he inveighs against this so-called rule that such evidence is inadmissible where the law presumes the intent, especially when taken in conjunction with the old rule that such evidence is admissible only when the *corpus* has been proved[32]: the propounder is then placed upon the horns of a dilemma. Since *Ball's* case the dilemma is at any rate removed. Were counsel today in a case like *McDonnell* to seek to rely on the similar fact evidence as proof of the *actus*, he could not be silenced merely by the reply that such evidence was admissible only when the act had been proved.

[30] n. 26, *supra*. The case is given its correct title of *D. P. P.* v. *Ball* in the *Law Journal*, *Law Times*, *Criminal Appeal Reports* and *Cox* reports, but is wrongly named *R.* v. *Ball* in the official reports and the *Justice of the Peace* series.

[31] (1850) 5 Cox 153, cited Nokes, *An Introduction to Evidence* (1956), 2nd ed., 112.

[32] nn. 8, 9 (*supra*).

The decision in the *McDonnell* case was probably sound on the facts: in *R.* v. *Cooper*,[33] relied upon by Crown counsel, there seems to have been some doubt about the intent behind the words, and there was a closer nexus between the two occurrences, in each case the threats being uttered while on sentry-go. In *McDonnell* there was perhaps too long an interval between the two occurrences, and insufficient similarity between the threats. However, the principle as widely stated by Erle J. that the evidence was unnecessary is contrary to the earlier case of *Egerton*.[34] The facts were not unlike those of the *McDonnell* case, except that the offence was charged as common law robbery. E. was alleged to have demanded that P., a butler, deliver to him some of his master's clothes, or he would tell P.'s master that P. wanted to take diabolical liberties with him (E.). P. brought one of his master's coats. E. said he would pawn it, and return P. the duplicate ticket. The similar fact evidence, confirmed by other prosecution witnesses, was that E. did deliver the ticket to P. the following evening, but coupled it with a demand accompanied by similar threats for a further pound. Holroyd J. admitted the evidence as confirmatory of the truth of P.'s evidence, and eleven judges confirmed his ruling. There is, of course, all the difference in the world between the weight of evidence in the two cases. Here there was only the lapse of one day, and the victim was the same. Further, the delivery of the pawn ticket connects the two transactions, so that the confirming witnesses are able to corroborate the actual charge against the accused,[35] whereas the witnesses to the similar fact in *McDonnell* only indirectly show that the prosecutor is telling the truth as they do not implicate the accused in the offence actually charged.[36] Nevertheless, the evidence is " unnecessary " in the sense that Erle J. had used the word, though plainly admissible. There is no requirement of law or practice that a prosecutor in a robbery case must be corroborated. Whatever the present status of the case of *McDonnell*, it has met with support in Ireland, South Africa, India and the United States,[37]

[33] (1849) 3 Cox 547.
[34] (1819) R. & R. 375.
[35] The purpose of corroborating a prosecution witness has become a recognised head of admissibility of similar fact evidence. See *R.* v. *Lovegrove* [1920] 3 K.B. 643, a case of type 2 (a), and *R.* v. *Chitson* [1909] 2 K.B. 945. See also D. W. Logan in (1934) 50 L.Q.R. at p. 387.
[36] See n. 5 (*supra*).
[37] *R.* v. *Quilter* (1913) 47 Ir.L.T.R. 264, where the accused, father and son, were indicted for conspiracy to charge C. and D. with having posted threatening notices on October 16, and to procure the son to swear a false affidavit. The prosecution sought to prove that a month later the son brought to the police another threatening notice found wrapped in torn newspaper, which fitted torn newspaper found in the Quilter home. Cherry L.J. ruled the evidence inadmissible to prove design, system or criminal intent, because if a

and in his famous judgment in *Thompson* v. *R.* Lord Sumner seems to be invoking this so-called principle, when he says that a man whose act is so nakedly wicked as to admit no doubt about its character may be better off in regard to the admissibility of evidence.[38]

Case 2 (a). Defence of alibi

Turning to a consideration of case 2 (a), where the accused pleads an alibi, but concedes or cannot deny that a crime was committed by someone, the House of Lords decision in *Thompson* v. *R.* lays down that similar fact evidence is admissible on the question of identity that then arises.[39] T. was charged with committing acts of gross indecency with two boys on the sixteenth. The boys' evidence was that arrangements were made to meet again on the nineteenth. On the nineteenth T. was arrested talking to the boys. His defence was that the acts of the sixteenth were committed by some other man. Evidence was admitted that when arrested on the nineteenth he had in his pocket powder puffs, to show that he bore the hall-mark of the specialised and extraordinary class of perverts, and also that indecent photographs of naked boys were found at his lodgings.

Admissibility to prove identity has become one of the well-recognised cases where similar fact evidence may be introduced. It is mentioned as such in *R.* v. *Chandor*.[40] It is not confined to charges of unnatural offences, as the case of *R.* v. *Robinson*[41] illustrates. R. was charged with robbery on two different occasions separated by sixteen days. In each case a pay car had been forced to stop by a Jaguar, and the occupants assaulted and robbed by masked men. R. pleaded an alibi. He could hardly deny that a crime had been committed by someone. The Court of Criminal Appeal held that the sole issue was the question of identification, and on this, evidence of identification by two entirely different people in respect of the two entirely different raids was admissible on both charges. *R.* v. *Nicoloudis*[42] is a case where the evidence

man swears a false affidavit everyone sees that he intended it. In the South African case of *R.* v. *Davis* (1925) A.D. 30, 37, Innes C.J. said that on a charge of gross indecency no question of intent could arise because the nature of the act was unequivocal. It is not, however, always unequivocal in such cases: see n. 29 (*supra*), and the discussion of *R.* v. *Cole* (*infra*, n. 92). A full bench of the Calcutta High Court rejected similar fact evidence on charges of murder and theft, where the head of the victim had been practically severed from her body and practically everything she possessed stolen: *Emperor* v. *Panchu Das* (1920) 47 Cal. 671. As to the United States, Julius Stone cites and criticises a number of such cases: 51 Harv.L.R. 988, 1012–1015.

[38] [1918] A.C. 221, 232.

[39] *Ibid.*

[40] [1959] 1 Q.B. at p. 550.

[41] n. 27 (*supra*).

[42] (1954) 38 Cr.App.R. 118.

would probably have been admissible had it been argued on this basis. N. was charged with obtaining money from a bank by means of a cheque bearing the forged signature of a college friend. N.'s defence was that he was not the person who presented the cheque. The prosecution led evidence that a year before he had been arrested and charged with forging his guardian's signature, but the guardian induced the police to drop the proceedings. The evidence was offered to show that N. knew the cheque was forged, and also as evidence of bad character, but was held inadmissible by the Court of Criminal Appeal. Certainly there would have been more likelihood of the evidence being received had it been propounded to establish identity. It seems to be one of those forgotten category cases that Julius Stone attributes to the failure to acknowledge a general rule of admissibility: with only exceptions to rely on, exceptions are apt to be overlooked, or reliance placed upon an inappropriate one.[43]

Case 2 (b). Where the crime is admitted and also opportunity

The leading case under 2 (b) is that of *Straffen*.[44] He was charged with the murder of a little girl by strangling during a few hours of liberty following an escape from Broadmoor. S. hoped to evade the adduction of similar fact evidence by admitting that he had met the child, though denying that he had strangled her. The Court of Criminal Appeal held, however, that an issue of identity was raised, and that evidence of two previous murders of little girls, for which he had been confined to Broadmoor, was properly receivable. The court applied the hall-mark test of *Thompson's* case,[45] there applied to the criminal, to the nature of the crime, the adroit manual strangulation, the absence of any sexual interference, and the failure to take advantage of readily available means of concealing the body, characteristics of each of the three crimes.[46]

A few months before *R.* v. *Straffen* was decided, a case falling into the same category was before the House of Lords: *Harris* v. *D. P. P.*[47] H. was a policeman charged in eight counts with office-breaking and larceny from a closed market on eight different dates. H. was convicted only on the eighth count, which related to an occasion when a trap was set for H. H. was not caught red-handed, but he did not immediately approach his fellow policemen when the alarm sounded, and the stolen marked money was found

[43] 51 Harv.L.R. 988, 1022.
[44] n. 28, *supra*.
[45] n. 39, *supra*.
[46] [1952] 2 Q.B. 911.
[47] [1952] A.C. 694

in a bin where he could have placed it when surprised by the alarm. The only evidence on the other seven counts was that the thefts were similar, and each time H. was on duty in the market. The Court of Criminal Appeal held that the evidence on the other seven counts was admissible on the eighth count, not to prove identity, as this was not in issue, because H. admitted that he was there in the course of his patrol, but to rebut the appearance of innocence which the facts might otherwise wear.[48]

It is submitted that the question was, as in *Straffen's* case, one of identity. In both cases the main fact that a crime had been committed was proved independently. In *Straffen* the fact that the girl had died from manual strangulation showed that a crime had been committed by somebody. In the *Harris* case, Lord Simon said in the House of Lords that it was proved beyond dispute that money had been stolen on the night the trap was set for Harris.[49] Both Straffen and Harris admitted they were present, and had the opportunity to commit the crime. The question then became one of identity. Was the author of the crime the accused or someone else? It is submitted that Hallett J., delivering the judgment of the Court of Criminal Appeal in *R.* v. *Robinson*,[50] attempts to sustain an impossible position when he treats *Harris* as a case where there was no question of identity, but *Straffen* as one where an issue of identification did arise. Lord Simon in the House of Lords seems to support the view here advanced, when he says that the eighth count raised two issues: (i) Was the money stolen? (ii) Was it H. who stole it? His Lordship says that (i) was proved beyond dispute.[51] Surely the vital question is considered to be whether H. was the thief or another, *i.e.*, a question of identity. The House of Lords reversed the Court of Criminal Appeal in *Harris*, and held that the evidence should not have been admitted, but apparently only on the ground that it should have been rejected in discretion as of small weight and highly prejudicial.[52] It is therefore submitted that *Harris* stands with *Straffen* as the two leading authorities for the proposition that similar fact evidence may be admitted in case 2 (b), to prove identity, where the accused admits or cannot deny the *corpus delicti*, and also admits opportunity, but denies that he committed the crime.

[48] [1952] 1 K.B. 309, 317.
[49] [1952] A.C. 694, 711.
[50] (1953) 37 Cr.App.R. 95, 104, 106.
[51] n. 49, *supra*.
[52] This is the explanation of the *ratio decidendi* given by Lord Oaksey, the dissenting judge: *ibid.*, at p. 713. Presumably if he was in error, his learned brethren would have corrected him.

Case 1 (a). Where the crime and opportunity are denied.

Turning now to consider cases 1 (a) and (b) which are particularly germane to the factual situation in *R.* v. *Chandor*, case 1 (a) is the position where the accused denies both the *corpus delicti*, and also his opportunity to commit the crime had he so desired. The leading case is *R.* v. *Alfred Hall*.[53] H. was charged in eight counts with gross indecency with three men. His defence as to two of the men, Bowden and Chapman, was that he was giving them medical treatment. As already submitted, the case as to Bowden and Chapman falls outside the scope of this article: the external facts alleged are admitted, and the question becomes one of *mens rea*.[54] H.'s defence as to the third man, Ritchie, was that he had never seen him. The Court of Criminal Appeal held the evidence of Bowden and Chapman admissible on the charge regarding Ritchie, as it went to identity as in *Thompson* v. *R.*[55] It is, however, possible to distinguish *Thompson* as a case where T. admitted that an offence had been committed.[56] Cowen and Carter do so distinguish *Thompson's* case, and express dissatisfaction with *R.* v. *Hall*.[57] It is certainly surprising that Lord Goddard should extend existing authority in the very judgment where he returns to what Julius Stone calls the spurious rule, a rule associated with regrettable rejections of similar fact evidence, and renounces the original rule.[58]

But even if the decision in *Thompson* is to be restrictively distinguished, the subsequent decision of the Court of Criminal Appeal in *R.* v. *Twiss*[59] has also to be explained. Twiss was charged with gross indecency with a boy of sixteen. Evidence was admitted that photographs of nude boys were found on Twiss' person when arrested, and others at his lodgings. One report describes Twiss' defence as putting the whole story of the boy in controversy.[60] Rupert Cross says that Twiss admitted that the boy came to his lodgings.[61] If this were so, it would remove the case from category 1 (a) and place it in category 1 (b) where the *corpus delicti* is denied, but opportunity is admitted. None of the eight reports, however, refers to this admission, though it may, of course, appear in other sources.

[53] n. 25, *supra*.
[54] n. 29, *supra*.
[55] n. 27, *supra*.
[56] For this reason, in the analysis here attempted, *Thompson* is placed in category 2 (a), and *Hall's* case, where Ritchie is concerned, in category 1 (a).
[57] *Essays on the Law of Evidence*, 121–122.
[58] n. 22, *supra*.
[59] n. 25, *supra*.
[60] See the argument for Twiss as reported in (1919) 88 L.J.K.B. 20, 22. Another report quotes Darling J. as saying in the course of delivering the judgment of the court that "all the facts are in dispute": 26 Cox 325, 329.
[61] *Op. cit.*, p. 292.

The decision in *R.* v. *Twiss* has not gone unchallenged by writers.[62] In *R.* v. *Davis*,[63] the Supreme Court of South Africa refused to follow it in a case of gross indecency, on the ground that it was opposed to the reasoning in *Thompson* v. *R.*[64] Innes C.J., delivering the judgment of the court, treats *Thompson's* case as confined to circumstances where a definite issue has been raised as to the identity of the accused, referred to in this article as 2 (a). In *Twiss*, the judgment of the court, delivered by Darling J., treats the photograph evidence as admissible on the analogy of housebreaking implements or abortion apparatus found in the home of an accused burglar or abortionist.[65] This was an analogy of doubtful validity, and Innes C.J. points to the fact that in *Thompson*, Lord Reading refers to the admissibility of housebreaking implements found at the accused's home only where the defence is alibi,[66] and that Lord Sumner would reject such evidence if no tools were in fact used.[67] Innes C.J. refers also to *R.* v. *Taylor*,[68] where the Court of Criminal Appeal rejected evidence of a jemmy found at T.'s home on a charge of housebreaking, although the prosecution relied upon *Twiss*. Taylor's defence was that the breaking was accidental. He was playing football with a cabbage stalk with a friend. They had charged one another against the door and broken it open. There were no jemmy marks on the door. Counsel for the prosecution does not seem to have based his argument upon the best ground, *viz.*, that the evidence of the jemmy was tendered to rebut the defence of accident and to prove *mens rea*.[69] In *R.* v. *Manning*,[70] the Court of Criminal Appeal indicate that even where the defence is an alibi, evidence can be admitted regarding housebreaking implements at the home of the accused only if instruments of that kind had been used in the burglarious breaking.

All the indications are therefore that the analogy drawn by Darling J. in *Twiss* between unnatural offences and burglary was unfortunate. In English cases of housebreaking and the like, similar fact evidence almost always seems to be rejected,[71] while

[62] *Ibid.* See also Cowen and Carter, *op. cit.*, at p. 151.
[63] (1925) A.D. 30.
[64] n. 27, *supra*.
[65] [1918] 2 K.B. 853, 858.
[66] (1925) A.D. 30, 35, referring to [1917] 2 K.B. at p. 633.
[67] [1918] A.C. 221, 235.
[68] (1923) 17 Cr.App.R. 109.
[69] Such a plea would place the case outside the scope of this article: n. 29, *supra*.
[70] (1923) 17 Cr.App.R. 85. Held that if the breaking was by skeleton key, evidence of a jemmy found at M.'s home would be inadmissible, and vice versa.
[71] There are plenty of dicta that such evidence will be admissible, but it was rejected in *Harrison-Owen* [1951] 2 All E.R. 726; *Harris* v. *D. P. P.*, n. 23,

in the case of unnatural offences it is accepted in the majority of cases. *Manning* is an authority on all fours with *Thompson* yet the evidence is rejected. Therefore the mere fact that the references to burglary in *Twiss* are not supportable does not prove that the decision itself, relating to unnatural offences, is unsound. The reason for the difference of attitude seems to be that the housebreaker is regarded as only a little more dishonest than the ordinary run of mankind: it is a matter of degree. But the pervert is deformed, and shows not exaggerated faults of the common herd, but abnormal desires that place him in a special class.[72] The effect of this is seen in the judgment in *R.* v. *Sims*, a case under situation 1 (b) shortly to be considered.[73] It is there suggested that in ordinary offences articles found in the possession of the accused will be admissible only if there is a specific connection between the crime and those articles, but in the case of unnatural offences the abnormal and perverted propensity supplies sufficient connection even where the articles have not been actually used in the crime at all. It will be remembered that in *R.* v. *Straffen* the hall-mark test was extended to cover offences other than the unnatural, but it is suggested that this may perhaps be allowed only in cases where the similar fact evidence points with special particularity to one person as the author of the crimes.[74]

Case 1 (b). Defence of innocent association

Turning to situation 1 (b), where the crime is denied but opportunity admitted,[75] the leading cases are *D. P. P.* v. *Ball*, which has already been considered,[76] *R.* v. *Smith*, the brides in

supra; *Taylor*, n. 68, *supra*; *Rodley*, n. 2, *infra*; *Oriel* (1845) 9 J.P. 170; *Tidmarsh* (1931) 23 Cr.App.R. 44. In *R.* v. *Coulter* (1910) 5 Cr.App.R. 147, evidence of a prosecution witness that two days after the burglary charged, C. described to him two other burglaries he had committed was held inadmissible, but that C. asked him to take part in a projected burglary was admitted. In *R.* v. *Cobden* (1862) 3 F. & F. 833, evidence was admitted of three other burglaries on the very night of that charged, on the ground that the events of the night were so intermixed that it was impossible to separate them.

In the United States, a case to illustrate the admission of similar fact evidence on a burglary charge is *State* v. *Corcoran* (1914) 82 Wash. 44.

72 These remarks are a rough paraphrase of the way Lord Sumner's mind seems to have been working in the *Thompson* case [1918] A.C. at p. 235.

73 n. 14, *infra*.

74 n. 46, *supra*. Such cases are described by W. J. Dobie, dealing with Scots law in (1946) 58 Jur.Rev. 201, 206, as where the perpetrator has left his mark on the crime, not in a fingerprint or a footmark, but in the less certain but still recognisable form, of a peculiar method. He refers to Lord Sands' hypothetical accused who obtains food and lodging without payment by impersonating George Bernard Shaw, and in each case absconds in the morning with the family Bible: *Moorov* v. *H.M. Advocate* (1930) J.C. 68, 88.

75 n. 26, *supra*.

76 n. 30, *supra*.

the bath case,[77] and *R.* v. *Sims.*[78] The defence is always more or less clearly that of innocent association. The Balls pleaded that they were living platonically as brother and sister, Smith that his "wife" died a natural death, Sims that the men came to his house for a game of cards. Before considering the admissibility of similar fact evidence where there is an express plea of innocent association, two other situations have to be examined, first where the accused does not expressly raise the plea, but it is a possible defence that leaps to the minds of the members of an average jury, and secondly where the accused denies the prosecution story *in toto*, the 1 (a) position, but it could be argued that the possibility of innocent association must be considered as a defence, though not raised by the accused, should his complete denial of any contact with the alleged victim not be accepted.

As to the position where the defence is not expressly raised, but the plea must clearly be considered, the implication in *R.* v. *Chandor* is that a schoolmaster accused of an offence against a pupil does not have to rely upon innocent association, as there may be nothing in the circumstances that calls for explanation.[79] May he thus avoid the authority of *Sims*[80] that similar fact evidence can be given to rebut the defence of innocent association? The sheet-anchor of such an accused is the dictum of Lord Sumner in *Thompson* that the accused must not be credited with fancy defences, and may be better off if he runs one defence instead of two.[81] The question is whether he can be credited with obvious defences. Is a schoolmaster or scoutmaster charged with an offence against one of his pupils in a better position than an hotel guest charged with an offence against a kitchen hand? Is a goldsmith charged with poisoning his wife with arsenic or cyanide, which he uses in his legitimate trade, in a more favourable position than a solicitor similarly charged?[82] It is submitted that even if the accused schoolmaster or goldsmith takes refuge in silence when charged, the obvious defences of innocent association or innocent

[77] n. 26, *supra*. Stress is not laid upon this case under head 1 (b), as it is in some degree a hybrid bearing closer affinity with head 2 (b). The deceased died in her bath. Smith was the only person with the opportunity of murdering her. The question resembles one of identity, though it is not a question whether she died at the hands of S. or of another, as in case 2 (b), but whether she died from natural causes such as epilepsy or S. murdered her. In each case, however, the question at issue is one of causation.

[78] n. 14, *infra*.

[79] [1959] 1 Q.B. at p. 550.

[80] n. 14, *infra*.

[81] [1918] A.C. at p. 232.

[82] Noor Mohamed, accused of wife poisoning in the 1949 Privy Council case, n. 21, *supra*, was a goldsmith. Armstrong, similarly charged, was a solicitor, n. 90, *infra*. The goldsmith is less likely to blurt out excuses for the possession of arsenic, as Armstrong did, but does it alter the position of the accused *qua* the introduction of similar fact evidence if he does so? It is submitted *infra*, n. 1, that it is immaterial.

possession may be credited to him by the prosecution and rebutted by similar fact evidence.

From early days, the prosecution has been permitted to lead similar fact evidence to anticipate defences. One case is *R.* v. *Ward*,[83] where to establish that an instrument had been used to procure a miscarriage, other attempts upon the same woman were proved, as "it might be contended the instrument was innocently used." A case of the same sort is *R.* v. *Dale*,[84] though here the similar facts were against different women. Another pair of cases relate to embezzlement. In *R.* v. *Richardson*,[85] other transactions of a similar character were proved in case the defence should be that the errors were mere mistakes in bookkeeping.[85] This case was followed by the Court for Crown Cases Reserved in *R.* v. *Stephens*.[86] Modern authorities lay down that a defence may be anticipated, and that a plea of not guilty leaves the prosecution to combat all defences reasonably open to the accused.[87] The reasons for this are partly explained by Lord Simon in *Harris* v. *D. P. P.*: if the hands of the prosecution were tied by the reservation of the defence, the magistrates might not commit for trial, or the trial judge rule that there was no case to go to the jury.[88] Further, a jury may raise defences *suo motu*, and is sometimes instructed by the judge to consider them even when not pleaded.[89]

Reticence by the accused as to his line of defence will not, therefore, lead to the exclusion of similar fact evidence. It is further suggested that even if the accused expressly indicates that he will not be relying upon a particular defence otherwise open to him, he will not thereby avoid the introduction of similar fact evidence, except possibly where the renunciation of the particular defence is accompanied by a factual admission. *R.* v. *Armstrong* [90]

[83] (1840) 4 J.P. 587.

[84] (1889) 16 Cox 703. This case was considered by the Court for Crown Cases Reserved in *R.* v. *Bond* [1906] 2 K.B. 389, where the court held by five to two that evidence of similar facts was admissible to prove that the accused, a surgeon, used instruments upon a woman not for a lawful purpose, but to procure an abortion. Of the majority of five, Kennedy J. said that *Dale* was right (406), but A. T. Lawrence J. said it went too far (424), as did Alverstone L.C.J. of the dissident minority (395).

[85] (1860) 2 F. & F. 343.

[86] (1888) 58 L.T. 776.

[87] *Noor Mohamed* v. *R.* [1949] A.C. 182, 191.

[88] [1952] A.C. 694, 705.

[89] Sir John Salmond makes this point in his argument in *Rogan* (n. 17, *supra*). He refers to *R.* v. *Hopper* [1915] 2 K.B. 431, 435, where in a murder trial the defence relied upon was one of accidental killing, but the court held that the question of provocation must be put to the jury. Another such case is *Kwaku Mensah* v. *R.* [1946] A.C. 83, 92.

[90] [1922] 2 K.B. 555. The case considered purely on a defence of suicide would fall into category 2 (b): the *corpus delicti* is admitted, and also opportunity, but it is alleged that the crime was committed not by the accused, but by another, the deceased. On this basis, the leading case to suggest admissibility would be *Straffen*, n. 44, *supra*.

certainly indicates that where a defence has once been raised it cannot be discarded. Armstrong, upon his arrest for murdering his wife with arsenic, was found to have arsenic in his possession. He at once explained that this was for killing weeds. Though his counsel at the trial emphasised that his defence was suicide not accident, it was held that the Crown could rebut the statement on arrest by proving an attempt to poison a fellow solicitor a few months after his wife's death.

However, in the New Zealand case of *Horry*,[91] a change of defence was effective to rule out similar fact evidence, but it was coupled with an important factual admission. H. was charged with common assault upon a woman, L. When interviewed by the police, H. denied that L. was known to him, and on the depositions the question of identity was in issue. At the trial, the prosecution desired to lead evidence that two other girls had, like L., replied to H.'s newspaper advertisement, and met him by appointment. The prosecution case was that these other girls had been deceived by H., but not assaulted. Then counsel for H. gave an assurance that identity would not be disputed, and the evidence thus became inadmissible as it was relevant only on this issue.

R. v. *Cole* [92] is another case where renunciation of a defence already raised was held to render similar fact evidence inadmissible. C. was charged with indecent assault upon a young soldier, whom he had invited to sleep in his room, and who shared the same bed. The prosecution wished to prove letters from X to C., found in C.'s room, indicating that X and C. were addicted to homosexual practices. C.'s answers to cross-examination in the police court suggested that his defence would be that the acts complained of by the soldier were accidental not designed. At the trial the defence was a complete denial of the acts. The Court of Criminal Appeal held that the letters were inadmissible, observing, however, that had the defence denied that C. was the person with the soldier that night, or admitted the acts alleged but denied indecent intent, the evidence would have been admissible. It is submitted that the *ratio decidendi* of the case is unsound, but the two *obiter dicta* are in accord with authority. The *ratio decidendi* is that if C. admitted his presence but denied the acts, the evidence is inadmissible. This is contrary to the subsequent decision of a full Court of Criminal Appeal in *R.* v. *Sims*,[93] and is an instance of case 1 (b). The first *obiter dictum* may mean that C. denied that he was the man, but admitted that someone indecently assaulted

[91] (1949) N.Z.L.R. 791, 794.
[92] (1941) 28 Cr.App.R. 43, 46, 49.
[93] n. 14, *infra*.

the soldier. This is case 2 (a), and *Thompson's* case is authority for the admissibility of similar fact evidence.[94] If the *obiter dictum* means that C. said the whole story was a pack of lies, and he was absent, the case is 1 (a) and the evidence admissible within *R.* v. *Alfred Hall*.[95] If he admitted the acts but said they were innocent or accidental, the evidence is admissible within *R.* v. *Hall*,[96] but the case is no longer within the realm of similar facts to prove *actus*: the question is of the state of mind of the accused, the *mens rea*.[97] It is therefore submitted that the letters were prima facie admissible whichever of the three defences discussed was adopted by Cole. Whether they should have been rejected in discretion is another matter: the letters were fourteen years old, but Cole had kept them though he seems to have lived in one room.

Even though a possible defence is unequivocally and consistently renounced by the accused from the outset, it is submitted that the only way to restrict the use of similar fact evidence by the prosecution is to make a factual admission, which renders the evidence unnecessary, as in the hypothetical case mentioned by Denniston J. in *R.* v. *Rogan*,[98] that of the accused on a charge of burglary, who admits he was in that particular town on the night in question, and thus prevents the prosecution from proving that he committed another offence in that town that night to show he was in the vicinity. The mere circumstance that the accused indicates that he will not be relying on a particular defence does not mean that it will automatically become an immaterial question: it may nevertheless be the duty of the court to ask the jury to consider that defence as in *R.* v. *Hopper*,[99] and the full evidence must be before the jury to enable them to perform the duty of adjudicating upon it. Similarly, it is suggested that it should not avail Chandor to submit that he is not relying upon the fact that he was the schoolmaster of the alleged victims, and the possibility of innocent association, as this is a consideration the jury cannot ignore whatever the defence.[1]

R. v. *Rodley* [2] is a neat illustration of counsel for the accused saving him from proof of similar fact evidence by a timely admission, which rendered it irrelevant. R. was charged with

[94] n. 27, *supra*.
[95] nn. 25, 53, *supra*, victim Ritchie.
[96] nn. 29, 54, *supra*, victims Bowden and Campbell.
[97] *Ibid.*
[98] (1916) 35 N.Z.L.R. 265, 304, cited in Cross, *op. cit.*, 278.
[99] n. 89, *supra*.
[1] See *R.* v. *Rogan* (n. 5, *infra*) where some judges held that the defence of innocent association was open and rebuttable, even though the accused denied everything, both the crime and opportunity.
[2] [1913] 3 K.B. 468.

burglary with intent to rape P. The prosecution sought to lead evidence that an hour later R. broke and entered another house by means of the chimney, and had intercourse with the occupant with her consent, in order to prove that R. was raging with lust. The judge at once asked R.'s counsel what his defence was. Counsel was not evasive or non-committal,[3] but stated that the defence was that P. consented to R.'s overtures: he was there to court her with her consent. As R.'s presence was thus admitted, the similar fact evidence became irrelevant as immaterial. R.'s body may have been raging with lust, but he was not trying to gratify his desires by violence: he was seeking a willing victim, intending at the worst to seduce but not to rape, and the similar fact evidence did not prove any intent other than to seduce, which is not a criminal let alone a felonious intent. Had R. denied his presence, the evidence might have been admitted to show R.'s lustful state, and his readiness to storm dwelling-houses to assail the virtue of the occupants: though it could not, of course, prove violent tendencies, it would be some evidence of identity. It might still have been rejected as not sufficiently similar, or as unduly prejudicial even if prima facie admissible, but the distinction is that Rodley's admission rendered the evidence *necessarily* inadmissible.

To summarise, by judicious admissions counsel for the accused may be able to limit or exclude similar fact evidence, but he cannot do so by merely pleading not guilty, or by prevarication, or by saying that a defence will not be relied upon, unless the latter plea is supported by an admission of fact which renders it *impossible* for the defence to be raised.

The second set of circumstances where a plea of innocent association might be held to be open and therefore rebuttable, though not raised expressly, is where the accused denies the prosecution case *in toto*. The defence is clear cut. There was not only no opportunity, but no crime. Primarily this is a 1 (a) situation, but suppose the jury should not be prepared to accept the defence *in toto*, should the complete evidence as to a plea of innocent association, including evidence of similar facts, be before the members of the jury, in case they should find that there was opportunity?

[3] An example of evasion is at the trial of *Armstrong* (n. 90, *supra*). During the argument on the admissibility of similar fact evidence, Darling J., the trial judge, asked Sir Henry Curtis Bennett whether his defence was suicide, but the learned counsel refused to disclose the defence: *Notable British Trials*, p. 29. In defending *Smith*, accused of "bride" murder in a bath, Sir Edward Marshall Hall was extremely non-committal as to the exact nature of the defence: (1915) 11 Cr.App.R. 229.

This question was not really agitated in *R.* v. *Chandor*, but the implications are that in view of Chandor's complete denial the defence of innocent association is not in issue, and therefore not subject to rebuttal by similar fact evidence. The question was thoroughly threshed out in the New Zealand case of *Rogan*,[4] before seven judges of the Court of Appeal. R. was a general attendant at an industrial school for young offenders. He was charged with indecent assault on G., R. and M., three of his pupils aged from thirteen to fourteen. Similar fact evidence was led regarding assaults on three other boys of like age, H., B. and J. In some cases the assault was alleged to have taken place in R.'s room, in others in the boys' dormitories. A majority of four judges to three held the evidence of similar facts admissible to show system: there was, however, a further ground on which three of the judges regarded it as receivable.

Except in the case of the boy J., the defence was a complete denial that the boys had been to R.'s room on the relevant occasions. The question was whether the evidence was nevertheless admissible to rebut a possible defence of innocent association. There had been some hint of such a defence in the depositions, but at the trial counsel for R. flatly denied that such a defence would be raised. Nevertheless Stout C.J., Chapman and Edwards JJ. held the evidence admissible to rebut this defence, even conceding that at the committal proceedings R.'s counsel was not fully instructed, on the ground that the jury might well take this view without the prompting of counsel.[5] It is fair to add that Edwards J. was influenced by the fact that one of the alleged victims, G., was R.'s room boy.[6] This view seems to be the preferable one. It has already been submitted that similar fact evidence is admissible where the crime is denied *in toto*,[7] and there is no objection, therefore, to the jury's bearing the evidence in mind both on the question whether any crime was committed by anyone, and also in rebuttal of innocent association. Even if a different view be taken and such evidence be considered inadmissible where the defence is a complete denial, the only danger in admitting it on the question of innocent association is that the jury will also allow it to weigh with them on the question whether the crime was committed. Should the danger of this happening be considerable, the court will no doubt exercise its discretion and exclude the evidence entirely.[8]

[4] (1916) 35 N.Z.L.R. 265.
[5] *Ibid.*, *per* Stout C.J. (284), Chapman J. (330).
[6] *Ibid.*, at p. 321.
[7] n. 55, *supra*.
[8] n. 6, 1st series, *supra*.

In *Rogan's* case, two judges, Denniston and Stringer JJ., held that the flat denial of counsel negatived any reasonable possibility of the jury finding it was a case of innocent association, and rejected the evidence.[9] Of the other two judges, Cooper J., one of the majority of four on the main point of system, left this question open,[10] and Sim J. of the minority considered that the defence of innocent association would be in issue only if the defence had conceded that hands had been laid upon the boys but for an innocent purpose, and not merely because there was an admission that the boys were present in his room.[11] This latter view of Sim J. is perhaps that held in *Chandor*. It is supported by the dicta in *Cole*, where it was held that the similar fact evidence was not admissible if the accused admitted his presence, but only if he admitted the external act, and pleaded innocent purpose or an accident.[12] This is the great divide between the judges who hold that in some circumstances similar fact evidence can serve to prove *actus reus*, and those who hold it admissible only on *mens rea*.[13] If handling is admitted, the external act is proved, and even the judges of the latter school will admit the evidence to prove *mens rea*, and to negative accident or mistake, but it has been submitted here that there is a growing number of instances of the admission of such evidence to establish the *actus reus*.

It is a modern authority that governs the last situation relating to innocent association, the case where this defence is expressly pleaded. In *R.* v. *Sims*, the accused, in answer to charges of sodomy and gross indecency with four men, pleaded that they came for a game of cards.[14] It was held that the evidence of all four men was admissible on all the charges, although the four incidents were all independent of one another and each witness could testify only as to the assault upon himself. The court refused to follow *R.* v. *Cole* [15] and *R.* v. *Bailey*.[16] The latter case is of

[9] (1916) 35 N.Z.L.R. 265, *per* Denniston J. (304), Stringer J. (342). This view is also held by Cross (1959) 75 L.Q.R. at p. 337. One paramount reason for adhering to the contrary view is that under modern conditions the besetting sin of the English law of evidence is that there are too many strict rules excluding material matter. The development of the notion of judicial discretion in the last forty or fifty years has given the criminal courts some opportunity to relax imperceptibly this strictness at any rate in borderline cases, secure in the knowledge that the interests of the accused can be safeguarded by the duty of the judge to exercise his discretion before admitting even admissible evidence: n. 6, 1st series, *supra*.

[10] *Ibid.*, at p. 328.

[11] *Ibid.*, at p. 336.

[12] n. 92, *supra*.

[13] The latter view is losing ground in view of modern cases. See the change in the treatment in Halsbury: n. 8, 1st series, *supra*.

[14] [1946] K.B. 531. This fact is mentioned in *Hall* [1952] 1 K.B. 302. Facts of *Sims* are set out in great detail in (1946) 96 L.J.(News.) 709.

[15] n. 92, *supra*.

[16] [1924] 2 K.B. 300.

little weight. The conviction of headmaster B. on sixteen counts of gross indecency with sixteen of his boys was quashed, on the ground that the verdicts on the sixteen counts were not taken separately. The remarks on the admissibility of the evidence are weakened by the absence of any reference whatever to the similar fact principle, although Crown counsel had referred to the cases of *Makin* [17] and *Armstrong*.[18] *R.* v. *Ailes* [19] is another case supporting *Sims*. Ailes was charged with an indecent assault upon a girl of ten in the cinema where he was an attendant. Evidence was admitted of a similar assault four days later on a girl of twelve "to show Ailes was a man with distorted sexual passions and that he was addicted to such acts of indecency." Unlike Sims, Ailes was not an accused charged with unnatural practices. It has already been remarked that the case of the pervert may have to be treated differently from that of the dishonest accused, who merely displays human failings in a more marked degree than his fellow men.[20] Men such as Ailes possess the normal feelings of mankind, exaggerated and distorted, but still recognisable. Even Julius Stone, that strong advocate of the admission of such evidence, gives a warning against its admission to prove a lewd and lascivious disposition.[21]

Signs have been noted of a modern trend to treat principles first laid down in cases of unnatural offences as of general application,[22] but whether or not this is the case, *R.* v. *Chandor* was concerned with that special sphere. Attack has been mounted against the judgment in that case not because in the outcome the similar fact evidence was rejected. It is admittedly a dangerous weapon in the hands of the prosecution, and its use must sometimes be restrained. Such restraint may well have been advisable in view of the fact that it was a case where corroboration was required as a matter of practice, and the evidence of the other alleged victims could not provide this corroboration.[23] It may well be that the trial judge should properly have exercised his discretion to exclude the evidence even if prima facie admissible. But in delivering the judgment of the court, the Lord Chief Justice, only a month or two after assuming this great office, has laid down

[17] n. 14, 1st series, *supra*.

[18] n. 90, *supra*.

[19] (1918) 13 Cr.App.R. 173. The case is not a strong authority as scant regard is paid to the similar fact rules: in this respect it is a case like *Chandor*.

[20] n. 72, *supra*.

[21] (1938) 51 Harv.L.R. 988, 1031. Admittedly Stone gives the same warning regarding unnatural offences. His remarks in that context require modification since the subsequent case of *Sims*, n. 14, *supra*.

[22] n. 74, *supra*.

[23] n. 5, 1st series, *supra*.

some challenging statements of a width and brevity that on the face of them deny the admissibility of similar fact evidence to establish the commission of a crime, and imply that a schoolmaster who admits opportunity when charged with indecent assault upon a pupil does not need to plead innocent association, so that there is no defence which the prosecution may rebut with such evidence. Principles may be hard to find in the welter of cases in this branch of the law, but statements so sweeping, so patently contrary to some decided cases,[24] and not furnished with supporting authority by their author can do nothing but envelop in further obscurity such principles as there may be.

[24] In (1959) 75 L.Q.R. 333, in an article not published when I was writing this paper, Cross tries to rationalise *Chandor*, and to find a place for it within the existing framework: he ingeniously distinguishes the case from that of *Alfred Hall*: *ibid.*, at p. 342.

SCANDINAVIAN REALISM

H. L. A. Hart

English and Scandinavian legal theory have long shared many points of view. Among these are the belief that law is something man-made and made for men; hostility or indifference to doctrines of natural law at least in the scholastic form; and a general disbelief in the capacity of philosophical systems to throw light either on what law is or ought to be. Yet notwithstanding these similarities the principal Scandinavian tradition in legal theory has a different *tone* from its English counterpart. Though professedly sceptical in aim and empirical in method, it is much more like a kind of philosophy. The work of the founder of this tradition, Axel Hägerstrom, had for its motto *Censeo metaphysicam esse delendam* and is a sustained effort to show that notions commonly accepted as essential parts of the structure of law such as rights, duties, transfers of rights and validity, are in part composed of superstitious beliefs, "myths," "fictions," "magic" or rank confusion. This tradition, continued in the work of his disciples Lundstedt, Olivecrona and Alf Ross, has made contact with both American "rule-scepticism" and contemporary linguistic philosophy. Its latest most sophisticated product is Ross's recently published book *On Law and Justice*.[1]

This is in many ways an interesting book, and at points a brilliant one, though by no means free from the fiery dogmatism of Scandinavian "realist" jurisprudence. Ross is less tortuous and obscure than Hägerstrom, less naïve and professorial than Lundstedt; and richer in illuminating examples and concrete detail, if less urbane, than Olivecrona. He writes in a clear, interesting and at times racy style; though these felicities may be in part due to the great skill of the translator. Moreover, whatever may be thought of the author's general theory, his eye for legal detail is always shrewd and discerning. Many a lawyer and judge would be better off for reading his powerful pages dealing with interpretation of statute.

The inspiration of the book generally is a *saeva indignatio* against metaphysical confusions and pseudo-rational concepts which still lurk, according to Ross, in conventional accounts of the structure of law, and in theories concerning the standards of morals and

[1] *On Law and Justice*, by Alf Ross.

justice used in the criticism or evaluation of law. So the author is hostile both to the tradition of natural law and to formalism, even when it is the formalism of "positivists" like Kelsen. Both these sin against the author's guiding principle that law and the criticism of law must be interpreted in terms of "social facts." The methods of "modern empirical science" must be used, and legal thinking must be explained in terms of "the same logic as that on which other empirical sciences are based."

Though there is much that is questionable, indeed blinding, in the attempt to force the analysis of legal concepts or of any rules into the framework adapted for the empirical sciences, Ross's sceptical attack on conventional doctrines is far more sophisticated than many previous attempts to uncover behind legal forms and theories the "facts of social reality." The book falls into two parts. The first nine chapters are concerned with the structure of law and the analysis of its leading notions; the last eight with the standards used in its criticism. In both cases the author's aim is to dispel misconceptions often engrained in the vocabulary of law and morals, and to replace these either by rational empirical conceptions or by frank acknowledgment of the points at which "irrational" elements must intrude into the management of social life.

I shall deal first with the second part of the book. Though interesting, this is less original than the first, owing much to Popper's *The Open Society and its Enemies* and Stevenson's *Ethics and Language*. It contains a critique of classical and Thomist Natural Law, of the idea of Justice, and of Utilitarianism, and also three chapters concerned with what the author terms "legal politics." This is a discipline, still undeveloped, which the author favours, and thinks lawyers should pursue. Its central task is to discover *not* the aims or ends of law but the best methods of adjustment of law to changing technical or "ideological" conditions, and to equip the lawyer to referee between experts when they disagree concerning social changes. It is an art where the value of the result is measured "by being in fact accepted by others, particularly those in power." With this modest, relativistic conception, we should contrast the arch-error of thinking that moral standards or values are part of the fabric of the universe awaiting our discovery by rational methods. Moral values are attitudes which human beings adopt, not facts about the world to be established. Though they may be changed either by non-rational methods (propaganda) or by rational change in beliefs about facts, they cannot be proved or disproved by rational argument.

In his elaboration of these not unfamiliar themes, the author says much still worth saying, especially concerning the concept of social welfare, and the relationship between private and public "interests" left in so cloudy a state by Pound. He can also strike a ringing phrase: "Like a harlot, natural law is at the disposal of everyone. The ideology does not exist that cannot be defended by an appeal to the law of nature."

Yet the author's misplaced affection for the battle cry of "meaningless" and his readiness to smell the rat of "Natural Law" in every moral position not prostrate before the methods of the sciences, leads him into some absurdities. Surely it is wrong to say (p. 274) that the words "just" and "unjust" applied to a legal rule as distinct from a particular decision are "devoid of meaning." When we assert that a rule forbidding black men to sit in the public park is unjust we no doubt use, as our criterion of just treatment, the unstated principle that, in the distribution of rights and privileges among men, differences in colour should be neglected. In any full defence of this assertion the implicit criterion would have to be made explicit. But the dependence of concepts like justice on implicit varying and challengeable criteria does not render them meaningless when applied to law. What is true of justice is true of all concepts into which variable standards are built. Words like "long," "short," "genuine," "false" "useful" exhibit the same feature.

It would take too long to defend Hegel here against the charge of "fantastic nonsense" (p. 251). But why should Kant's statement that "a course of action is lawful if the liberty to pursue it is compatible with the liberty of every other person [to do likewise] under a general rule" be called *meaningless*. It may be false or useless, but if it is these it cannot be meaningless. Clearly, further consideration of the meaning of "meaningless" is needed. And was Mill really guilty of incorporating "pure natural law ideas" when he said that the only justification for legal coercion was to prevent one man from harming another? Even if it is true, as Ross asserts, that harm means infringing the moral right of others (an assertion which may well be disputed), the implication that men have moral rights need not entail belief in "Natural Law," unless the latter is used simply as a misleading expression for morality. Has the author never acknowledged that someone has a moral right, though no legal right, to some promised service, or never denied that another has a moral right to interfere in his affairs?

For many, the main interest of the book will lie in the treatment of the concept of legal validity in the early chapters. Yet

interesting as this is, it displays very clearly the peculiar dogmatic insistence of the Scandinavian school that if a statement cannot be analysed as a statement of fact or expression of feeling it *must* be "metaphysical." The statement that, *e.g.*, the provision in section 9 of the Wills Act, 1837 (concerning the number of witnesses required in a will), is a valid rule of English law might seem innocent enough and not difficult to establish as "true" or at least "correct." But for Ross legal validity is a dangerously septic notion; unless we handle it carefully, wearing the protective rubber gloves of an "empirical methodology" determined to admit into our stock of notions only hard empirically verifiable facts, we shall catch the infection of "metaphysics." For in Ross's view the analysis of this and many other legal notions must take one of two forms: either it refers to the actual future behaviour and feelings of people (mainly judges) or it must refer to some mysterious unobservable quality which some rules have and others lack. So our choice is between taking "X is a valid rule of English law" as a prediction of judicial behaviour and feeling—or metaphysics. Kelsen's insistence that legal thinking must be interpreted in terms not of facts or "is-propositions" but of "ought-propositions" is therefore to be rejected as a metaphysical construction "raising the law above the world of facts."

Ross starts his analysis of legal validity by considering the simpler case of the rules of chess, though it is of some importance to note that we do not usually speak of rules as "valid" except where, as in the legal case, the system contains some general criteria for the *identification* of the rules. Ross claims that a chess rule, *e.g.*, that the bishop must be moved diagonally (my example), is a "valid rule of chess" if (1) players regularly move the bishop in this way and (2) they do so because they experience a feeling of compulsion to follow this pattern of behaviour. Accordingly the rule is, in these circumstances, something which (a) enables us to understand or interpret the players' actions as coherent motivated conduct and (b) to predict their future behaviour. The rule-formula therefore serves both as a "scheme of interpretation" and a basis of prediction. The parallel analysis in the case of legal validity is as follows. Legal rules are essentially directives to courts to apply sanctions under certain conditions. (This Kelsenian dogma is adopted without much argument.) To say that a legal rule is valid is to say (1) that courts will under specifiable conditions apply it or at least regard it as specially important in reaching their decisions and (2) they will do so because they have an emotional experience of "being bound" by the rules.

A valid law is a verifiable hypothesis about future judicial behaviour and its special motivating feeling.

Apart from the reference to feeling and the treatment of a legal rule as a "scheme of interpretation" as well as a basis of prediction, Ross's analysis is not very different from the cruder American realist theories which treat statements of legal rights and duties as predictions of official action. Like these simpler theories, Ross's predictive analysis of legal validity is open to two objections which he never squarely faces. First, even if in the mouth of the ordinary citizen or lawyer "this is a valid rule of English law" is a prediction of what a judge will do, say and/or feel, this cannot be its meaning in the mouth of a judge who is not engaged in predicting his own or others' behaviour or feelings. "This is a valid rule of law" said by a judge is an act of recognition; in saying it he recognises the rule in question as one satisfying certain accepted general criteria for admission as a rule of the system and so as a legal standard of behaviour. Secondly, even if (though this may well be doubted) non-judicial statements of the form "X is a valid rule" are always predictions of future judicial behaviour and feelings, the basis for such predictions is the knowledge that the judges use and understand the statement "this is a valid rule" in a non-predictive sense.

Ross is right in thinking that we must distinguish an *internal* as well as an external aspect of the phenomenon presented by the existence of social rules. This is true and very important for the understanding of any kind of rule. But unfortunately he draws the line between these aspects in the wrong places and misrepresents the internal aspect of rules as a matter of "emotion" or "feeling"—as a special psychological "experience." Only by doing this is he able to create the impression that what Kelsen terms "ought-propositions" may be dispensed with in the analysis of legal thinking. In fact the elucidation of the internal aspect of any normative discourse requires such propositions, and if we carefully study them we shall see that there is nothing "metaphysical" about them, though their "logic" or structure is different from statements of fact or expressions of feeling.

The required distinction between external and internal is not one dividing physical behaviour from feeling, though of course that can be drawn; it is one dividing two radically different types of statement for which an opportunity is afforded whenever a social group conducts its affairs by rules. Thus an external observer of the group who does not accept or endorse the rules may report the fact that the group behaves in certain uniform ways and regularly reacts to deviations in adverse or hostile ways either through

officials or private persons. He may predict both the future behaviour of the group and the future reaction of officials. Such statements are external statements of fact *about* the group and the efficacy of its rules. But if the group really has rules and not merely a set of convergent habits, members of the group display this by use of expressions of a different kind. These expressions do not state the fact that they follow or will follow regular patterns of behaviour; but members of the group use these expressions in the *criticism* of their own and each other's conduct by reference to the regular patterns of behaviour which they accept as a *standard*. They do not merely react to deviations from the regular pattern in a predictable adverse manner but treat deviations as a *reason* for such reaction and demands for conformity as *justified*.

When a pattern of behaviour is thus taken as a standard the criticism of conduct in terms of it and the claims and justifications based on it are expressed by the distinctive normative vocabulary of "ought," "must," "should," "may," "right," "wrong," and special variants like "duty" and "obligation." The forms "I (you, he, they) ought to do that" and "I (you, etc.) ought not to have done that" are the most general ones used to discharge these critical normative functions which indeed constitute their meaning. They are not external statements of fact predicting likely behaviour in accordance with the standards; they are internal statements in the sense that they manifest acceptance of the standards and use and appeal to them in various ways. But the internal character of these statements is not a mere matter of the speaker having certain "feelings of compulsion"; for though these may indeed often accompany the making of such statements they are neither necessary nor sufficient conditions of their normative use in criticising conduct, making claims, and justifying hostile reactions by reference to the accepted standard.

Ross treats statements of legal validity (*e.g.*, "this is a valid rule of Danish law") as an external statement of fact predicting judicial behaviour and feeling. Yet the normal central use of "legally valid" is in an internal normative statement of a special kind, and Ross's failure to give a plausible account of the use of this expression in the mouth of a judge, where its internal character is clear, is due to his more general failure to allow for the internal non-factual, non-predictive uses of language inseparable from the use of rules. The internal statement "This is a valid rule," as distinct from the external predictive statement "In England they will follow this rule," is appropriate when a system of rules contains, as legal systems do, not only primary rules forming legal standards of behaviour, but also rules for recognising, or general

criteria identifying, the primary rules of the system by certain marks. So when a judge recognises a statutory provision as "valid" he identifies this as a primary rule, using for this purpose an unstated rule of recognition or criteria of identification which might be formulated as "What the Queen in Parliament enacts is a legal standard of behaviour."

The concept of legal validity is in some respects different from that of a chess rule to which Ross compares it and much more like that of a score in a game. When the scorer records a run or goal he is using an accepted, unstated rule in the recognition of critical phases of the game which count towards winning. He is not predicting his own or others' behaviour or feelings, nor making any other form of factual statement about the operation of the system. The temptation to misrepresent such internal statements in which use is made of an unstated, accepted rule or criterion of recognition as an external statement of fact predicting the regular operation of the system is due to the fact that the general acceptance of the rules and efficacy of the system is indeed the *normal context* in which such internal normative statements are made. It will *usually* be pointless to assess the validity of a rule (or the progress of a game) by reference to rules of recognition (scoring) which are not accepted by others in fact, or are not likely to be observed in future. We do, however, sometimes do this, in a semi-fictional mood, as a vivid way of teaching the law of a dead legal system like classical Roman law. But this normal *context* of efficacy presupposed in the making of internal statements must be distinguished from their normative meaning or content.

It is therefore vital if we are to understand social rules and the normative uses of language which are an inseparable part of this complex phenomenon of social life not to accept Ross's dilemma: "Either construe these as predictions of judicial behaviour and feelings or as metaphysical assertions about unobservable entities above the world of facts." The dimensions of legal language are far richer than this allows. It is, however, equally important to stress that though "ought-propositions" and other forms of normative internal statements are both necessary and harmless in the analysis of legal thinking, it does not in the least follow that a legal system is "a closed logical system" alleged to be dear to the formalists' heart, or that legal statements of rights and duties or validity are all deducible from clear determinate legal rules. Of course, it is here, as everywhere in law, a matter of a central core of certain meaning and a wide penumbra of uncertainty leaving room for judicial choice. Sometimes, where the rules are vague, all we can do is to predict what judges will say, and to do this we may

use, in a guarded way, the word "valid" or the cautious form "I think this is valid." Among the many good things in the first part of this book, none are better than Ross's discussion of judicial reasoning in the area of the penumbra and the non-formal sources of decision. But even here, even where the system's criteria for identifying particular rules of the system are vague or indeterminate, Ross's predictive analysis cannot hold good for "This is a valid rule" said by a judge. And surely, until the central function of assertions of legal validity as a species of internal statements is recognised for what it is in the *clear* cases, we shall not understand their use in the more debatable area of the penumbra.

BOOK REVIEWS

Potter's Historical Introduction to English Law and its Institutions. Fourth edition. By A. K. R. KIRALFY, PH.D., LL.M., of Gray's Inn, Barrister-at-Law; Reader in Law at King's College, London. [London: Sweet & Maxwell, Ltd. 1958. xxxii, 647 and (index) 27 pp. £2 5s. net.]

Potter's Outlines of English Legal History. Fifth edition. By A. K. R. KIRALFY, PH.D., LL.M., of Gray's Inn, Barrister-at-Law, Reader in Law at King's College, London. [London: Sweet & Maxwell, Ltd. 1958. xvi, 276 and (index) 9 pp. 25s. net.]

DR. KIRALFY follows in the footsteps of his revered master, the late Harold Potter. Both have covered in their many books more topics than are within the range of most lawyers, and have attained a high standard of competence in all of them. Perhaps Potter would have written better if he had written less, but perhaps he would not have been so helpful to so many people. Dr. Kiralfy's remark that "obscurity of expression was foreign to Potter's nature" must be ascribed to an amiable loyalty: few of us, affectionate though our memories may be of him, as mine is, admire his style.

I regret that no part of the author's prefaces to the *Historical Introduction* has been reprinted. If there is a fifth edition I hope that the edition will perpetuate the third, fourth, and fifth paragraphs of Potter's preface to the third edition, for they tell one compendiously about the author's object and method.

The plan adopted by Mr. Landon, in his exemplary editions of Pollock's *Torts*, of enclosing in square brackets additions made by the editor, has not been followed by Dr. Kiralfy. In order that I might track down his contributions I asked him for references to the principal relevant pages. His help has enabled me to call attention to a number of his improvements.

Dr. Kiralfy has done very valuable work for the Selden Society and knows his way about its volumes better than most people. One of the great merits of his edition is that he has supplemented when necessary Potter's references to those volumes. But why does he use Roman numerals in citing them when the much more convenient arabic ones appear on their covers?

There was no reference to the legal profession in the index of the third edition, and that topic was dealt with in a short introduction to Part II, *History of Judicial Institutions.* Part II is now entitled

The Courts, and there is a separate chapter on *The Legal Profession*. It does what is required, but needs modification on the subject of solicitors. The reference to the Law Society suggests that it was not as important in the nineteenth century as it in fact was.

Dr. Kiralfy has made some useful additions to the account of the jury system. But his statement (p. 246) that "at first the bailiff of each hundred chose two electors who chose ten other prominent gentlemen to form a grand jury with them" may be objected to on the ground that the term "gentlemen" is an anachronism, and that the statement telescopes the procedure to such an extent as to be misleading.

He has not altered the confusing remark about early jurors that "they were not judges of fact": he indicates its meaning when he writes that it was up to them [*sic*] how they found out the facts (p. 244).

The statement about the abolition of the ordeal might with advantage have been reworded and perhaps expanded. At any rate there should be a reference to Plucknett's *Concise History*, pp. 118–119, where there is an excellent account of the matter.

As to *peine forte et dure* a reference to the primary authority for the statement that as late as 1658 a prisoner was pressed to death would be of interest. Stephen, in his *History*, gives the name of the prisoner—Major Strangeways—but not the source of his information. The same history mentions a case of a man being pressed in 1726 for an hour and three quarters, and then pleading not guilty.

Potter's obscure paragraph on the control of juries has been replaced by one distinguishing, though perhaps not in sufficient detail, between civil and criminal juries. But the sentence "trial by jury as we know it has existed only in the Anglo-American system" still stands. This dangerously sweeping statement happens to be untrue.

A much needed section on statute law has been added. It ends with the opinion that modern statute law is causing English law to lose its consistency. I wonder in what sense consistency has ever been a characteristic of English law.

Another useful addition is one on the period of reform inserted in the chapter on civil procedure. The writer does not refer to the Hilary Rules of 1834 by their conventional name: and why does he describe their contents as "some slight amendments"?

The third edition contained a chapter of nearly a hundred pages entitled the history of crime and tort. This has now been broken up with great advantage into a chapter of twenty-five pages on the history of crime and criminal procedure, and one of seventy-three pages on the history of tort.

Particularly to be commended is Dr. Kiralfy's insertion of seven pages on the history of common law crimes, a topic which was

neglected by Potter, as it has been by so many writers on legal history.

Potter's account of the distinction between tort and crime has been left as he wrote it. His third paragraph expresses a reasonable common-sense view, but the two previous paragraphs referring to the views of Holdsworth and of Maitland are so unsatisfactory that the editor might well have omitted them.

Equally unsatisfactory is Potter's attempt to present the views of Holdsworth and Winfield in the chapter on the evolution of tort, but I do not think that an editor could do otherwise than leave the text unaltered. The whole subject is highly controversial and suitable only for students at a fairly advanced stage.

The task of producing a new edition of a friend's work is one which it is most unselfish for a busy man, anxious to get on with his own research, to undertake. Dr. Kiralfy deserves the warm thanks both of Potter's family and of those who value his contribution to legal history. Fortunately in this instance advantage will accrue to the editor from the fact that his own *Source Book* was conceived as a companion volume, and that the two books will be bought and read together.

Potter's *Outlines of English Legal History* must have sold well, and I am glad of it. But I wonder what Dr. Kiralfy's evidence is for his statement that the book has proved popular as preliminary reading. I should not expect a beginner to find useful as an introduction a summary packed with detail. But it is convenient as a book of reference to one who having read larger books seeks to refresh his memory.

H. A. Hollond.

The Philosophy of Law in Historical Perspective. By Carl Joachim Friedrich, ph.d., Easton Professor of the Science of Government, Harvard University. [Chicago: University of Chicago Press; London: Cambridge University Press. 1958. x, 240 and (indexes) 13 pp. 36s. net.]

An intelligible jurisprudence, it may be submitted, needs to distinguish, and to make use of, concepts of different types. A descriptive concept or definition of law, in terms of observable fact, is required to identify intelligibly the subject-matter of discussion. One such general concept is needed as the base of each system of jurisprudence. It is universal, constant and unvarying in the sense that all law must, by definition, conform to it. It is basic in the sense that all analysis or explanation of law, or accounts of theories of law, must be related to it. Experience has shown that in order to be at all general it is necessarily formal, with no reference to the specific contents of legal rules. Such a formal, descriptive basic

concept, established for the purposes suggested, must be distinguished from normative concepts of law—that is, concepts which purport to prescribe the particular sources or contents of legal rules. These concepts are rooted in subjective feeling rather than in cognition. They need have no descriptive or existential value. They are entertained by persons playing roles which they interpret in terms of the contents of law, *e.g.*, judges "applying law," legislators "making law," citizens "obeying law"—and they serve to give guidance in the playing of those roles. Various such concepts have found general acceptance and have been characteristic of different times and places. Their variety (law as Divine Command, as reason, as idea, as sovereign will) may reflect or explain in varying degrees the differences in legal systems. Similarly rooted in feeling rather than in cognition and equally varied are other normative concepts, concepts of justice, accepted primarily as prescribing standards for critical evaluation of the contents of law. These concepts influence the contents of legal systems through the same channels and in much the same way as normative concepts of law.

It will be noted that use of the above three types of concept must result in a jurisprudence which takes account of human experience of feeling, willing and aspiration as well as observation of fact. In the introductory chapter to the work under review Dr. Friedrich agrees that "only by taking account of all the different kinds of experience can we give an image of the law adequate to reality and at the same time general" (p. 7). Drawing on experience of different kinds he constructs accordingly a single basic concept of law which is both normative in itself and intimately related to a concept of justice. The question is whether this complex concept, this attempted synthesis of fact and feeling, is intelligible.

Law, says Dr. Friedrich, is oriented towards justice as an approximation, though different views of justice may be considered (p. 191). What this orientation means, and how it affects the identification of law, is not quite clear. Hitler's rule had no basis in justice, yet was legal (p. 202)—though not in a strict sense (p. 219). Presumably, however, it is this orientation which makes law itself a normative concept, not only containing norms but dynamic, propelled by its own inner dialectic, between order and justice (pp. 205, 208), and becoming more nearly true law the more nearly it is the creation of the citizen-members of the legal community themselves (p. 223). Again this orientation seems to account for the paradox that there may be violation of positive law on a large scale without a breach of law, in the sense of right, being involved (p. 208). Thus we can have law which is neither law in the strict sense, in the sense of right, nor true law at all. Whether one wishes to attribute to it, in these circumstances, the

character of law is, at bottom, " a matter of philosophical speculation " (p. 227). And yet, after all, " it is not possible to deny the character of law to that law which is unjust " (p. 191). This seems intended as a philosophical conclusion, and not merely a truism.

Perhaps it would be unfair to ask Dr. Friedrich to tell us, after all this, how law is to be identified—this entity which, even when unjust, retains its orientation to justice and its normative character. Writers who philosophise about law seldom bother to tell us what they are philosophising about—the accepted meaning of a word; the " true " meaning; the nature of a positive order in society; or what that order, in their view, might preferably be. And, after all, we are all supposed to know what law is already. The fact is that Dr. Friedrich is thinking in French or German, not in terms of " law " at all, but in terms of " droit positif " or " positives Recht." And these concepts, it is submitted, attempt to combine in one notion elements which are, in the circumstances, as irreconcilable as the elements in the notion of a square circle. The resulting unintelligibility may be appreciated by considering their obvious English equivalent, " positive right," and the difficulties inherent in any attempt to use this term for the basic concept of a jurisprudence. Either all unjust material must be excluded from its scope, or all positive material covered must be construed as in some sense right. Neither alternative is obviously satisfactory—at any rate to a lawyer. If the first alternative (which is at least intelligible) is rejected, then positive right must be construed in some such way as " a normative and dynamic concept, oriented to justice, dialecting between mere positivity and its true exemplification in rightness." Basic concepts like this may appear to make more sense when expressed in French or German—the terms which they interpret are after all quite familiar, and apparently meaningful, in those languages. But this appearance, it is submitted, is a somewhat expensive illusion, but little cherished by English jurists. That such concepts are more readily accepted in the United States may be due to their affinity to the peculiarly American concept of law, embodied in the " due process " clause of the Constitution. This, too, requires of law more than mere positivity, and purports to limit its content. But this American concept of law is at once a term of art and a normative concept whose function it is to prescribe the action of American judges. In no sense is its function to facilitate the cognition of the subject-matter of a general science. A proposed basic concept with no descriptive value does not become intelligible as such simply because its acceptance as a normative concept may be admitted to be likely to have beneficial, though ill-defined, effects.

But to return to Dr. Friedrich. Having required something more than mere positivity for law to attain to its truth he requires rather less than an absolute standard for justice to achieve its realisation. This is all to the good, but the result is a standard

which, in practice, will seldom be clearly ascertainable. "Justice cannot be related to any one value, but only to the complex value system of a man, a community, or mankind" (p. 199). Hence "Just law is a system of reasonable rules which are grounded in the common experience of man, which seek to realise justice, which are created with the participation of all the members of the legal community on the basis of a constitution, and which rest on the continuous common effort of these members" (p. 229). But there is no hope of finding justice in default of a sufficient number of responsible and conscientious persons who seek to find a compromise between conflicting interests (p. 194). And the will even of the majority must be related to the "higher reason" of a system of values (p. 203). It must be augmented by reason, by reasoned elaboration in terms of the community's ideas, values and beliefs (p. 204), as such reason expresses itself in the judgment of the old, the learned and the wise (p. 203). Dr. Friedrich has no more to tell us about the specific rules of justice. His philosophising simply leaves him with faith in a constitution enfranchising the common man—so long as he lets religion and art well alone (p. 196) and leaves the interpretation of his ideas, values and beliefs to his elders and betters.

It is quite clear that Dr. Friedrich, in Part Two of this volume (Systematic Analysis, pp. 191 to 229), is concerned to state his political faith, and, in Part One (The Historical Development, pp. 3 to 188), to support it by a survey of the faith of previous thinkers, from the Old Testament scriptures to the modern revival of natural law. What is not so clear is the relation which this faith bears to political realities, though it is reflected generally in the outward forms of the United States Constitution. It may be suggested that Dr. Friedrich's faith could have been more intelligibly stated in terms of positive law and his subjective preferences with regard to its contents rather than in terms of philosophising on the objective, "true" nature of law and justice. The whole history of such philosophising, in fact, needs to be restated in this way and related to a clearly defined descriptive concept of positive law. Translating a writer's terminology we need to be told, as clearly as possible, what he thought about positive law and its accepted sources, his ideals in respect of it (justice) and his grounds therefor. For the understanding of social arrangements achieved by philosophers, their approvals and disapprovals, are of some general interest today. What they meant by terms like law and justice, in an existential or descriptive sense, are in themselves of interest only to the specialist, if indeed these happen to be intelligible at all. The effect of their concepts of law and justice on positive legal systems, operating as normative concepts, is of course another matter. It will indeed need much work by many scholars to set the History of the Philosophy of Law in anything approaching a true perspective. This is certainly not assisted by rendering as "law"

and "positive law" what might be more accurately if less intelligibly rendered as "right" and "positive right."

If one leaves on one side Dr. Friedrich's political faith and the difficulties of his terminology, is it possible to guess at the outlines of his theory of society? Perhaps it may be something as follows. Where a community is united in its ideas, its values and its beliefs, there is no problem of order. Here we have what he would call true law and the realisation of justice. Where this is not the case there may still be a general consensus of ideas, values and beliefs, and an order reflecting these which is imposed on deviants. This is still "just law." Power, however, may fall into the hands of those opposed, in varying respects, to the consensus. Here the imposed order will not fully reflect the consensus (unjust law), but there will be a tension in society between the values of the order and the values of the consensus, with a tendency towards a realisation of the latter (dialectic, within law, of power and justice, normative concept of law, orientation towards justice). Presumably order does not depend on a consensus, but in any order there will be a tendency towards the emergence and realisation of a consensus (law oriented to a justice which, unfortunately, seems to be unknowable until actualised). The disinterested compromise, the participation of the common man, the reason of the wise and aged —these will all promote the consensus. Perhaps. But perhaps they may hasten anarchy, or large scale purges, in which case there may result a very different consensus, with justice now standing on its head? The fact is that to identify justice with a consensus rather than with particular values may be an ingenious solution of the problem of the orientation of law to justice, but its realisation, as a matter of practical politics, may exact a high price, in the name of right, from the most deserving of minorities. Unless it is justifiable to believe, even more deeply than Dr. Friedrich, in the reason and tolerance of the common man, these practically irreconcilable concepts, right and positivity, would seem to remain once more unreconciled. Interesting to speculate about, philosophically. But at least, it may be submitted, far more intelligible than all that stuff about law and justice!

B. E. King.

The Results of Probation. A Report of the Cambridge Department of Criminal Science. [London: Macmillan & Co., Ltd. 1958. xvi and 112 pp. 21s. net.]

Of the value of probation as a non-punitive method of dealing with first offenders, both adult and juvenile, there has long been a large measure of unanimity among judges and magistrates, probation officers and criminologists. Frequently invoking limited but nonetheless effective statistics to press home the point, successive Home Secretaries have left little doubt in the public mind of the intrinsic

advantages of dealing with such offenders—by far, let it be remembered, the biggest single class of criminal transgressors—by keeping them out of penal institutions. Unlike its preceding study on *Sexual Offences*, the present volume by the Cambridge Department of Criminal Science contains no startling conclusions. Appearing as it does, however, almost contemporaneously with the establishment of a Departmental Committee to inquire into all aspects of the probation service in Great Britain, it serves the useful purpose of providing the Committee with exhaustive statistical material as to the success and failure rates of probation orders made in regard to *all* types of offender, not merely the basic class of first offenders.

Not unnaturally, the successes analysed in this study are ascribed to the system of probation, as it has been developed over the fifty-odd years since its inception in Great Britain by way of the Probation of Offenders Act, 1907. Conversely, it might be thought, the failures tend to detract from the usefulness of probation as a judicial sentence and it is here, perhaps, that the present study exhibits its principal weakness. Throughout, the whole emphasis is placed upon judging the success or failure of probation by reference to two inter-related criteria, first, the successful completion of the probationary period, and secondly, the after-conduct of the offenders following their discharge from probation. Thus it is stated (p. 3) that "*probation may be regarded as having failed to fulfil its purpose* either when a breach of the order or the commission of a further offence has led to the revocation of the order; or when a further offence has been committed during the period of three years following the completion of supervision." To the present reviewer this approach suggests somewhat too scientific, too categorical a basis upon which to judge the probation system. It is unfortunate, for example, that more attention is not directed towards the relevance of other extraneous but equally important factors such as the bad selection of cases, the absence of adequate support from the parents, the sufficiency of the information laid before the courts, the shortage of probation staff, their training and the question of case-loads undertaken by individual probation officers, not to mention the question of the present instruction in penology acquired by lay and professional magistrates. True, an awareness of the impact which some of these considerations may have on the success rates of probation is apparent from the references which are made to the fact that more favourable results might be expected even in regard to offenders with one previous conviction "if it were possible to improve still further the methods of selection and the system of supervision" (p. 6), and that, in judging the after-conduct of those placed on probation, failures "might be attributed as much to the unsuitability of the selection as to the treatment itself" (p. 26). But these cautionary observations are the *only* comments in such vein which appear throughout

the book and, not surprisingly, they are submerged in the wealth of statistical analysis which is conducted with the customary objectiveness of previous studies conducted by the Cambridge Department of Criminal Science.

A full-scale investigation of the kind of contributory factors mentioned above is clearly outside the declared purview of this study—indeed, this is the very kind of investigation which we are led to hope that the Morison committee will undertake—but the present reviewer feels that far more prominent attention might advantageously have been accorded to these considerations when attempting, in the opening chapter, to assess the effectiveness of probation. It tends to leave the door wide open for those unsympathetic critics of criminological research who, with some justification, point to the aridity of purely statistical analysis of correctional data. In the preface Dr. Radzinowicz rightly points out that, prior to the last decade, little or no definite information was available by which to judge the success or otherwise of particular methods for dealing with juvenile and adult offenders. Isolated research projects have been carried out in Great Britain by various agencies and individuals, all of them pioneering efforts. At the moment, the climate of public and parliamentary opinion seems particularly receptive to the idea of research into the effectiveness of various methods, whether old or new in inception, of dealing with those who are brought before the criminal courts. What must be safeguarded against is any tendency to view these problems from any single exclusive approach, a danger into which, it is suggested, the examination of statistical data alone may all too readily lead the researcher.

Allowing for these doubts, what do we learn from this analysis of 9,000 or so juvenile and adult offenders placed on probation by courts within the Greater London area during the three-year period 1948–50? This sample collection represents something like 10 per cent. of the total number of persons in respect of whom probation orders were made during the same period in the whole country, and while it would be even more enlightening to compare the practice in other parts of Great Britain, there is no reason why this study should not be accepted as a satisfactory basis from which to adduce certain general conclusions as to the effectiveness of probation. From beginning to end the approach adopted is to measure and compare the results obtained from probation when applied to different categories of offenders—juveniles and adults, males and females, first offenders and recidivists. Some of the newer lessons to be derived from this particular study concern the value of probation as a means of dealing with recidivists, a term used in this work, somewhat confusedly, to describe a person with *one* or more previous convictions for indictable offences, by no means necessarily a persistent offender. One of the significant facts, for example, which emerges is that although probation was

used predominantly for first offenders (66 per cent.), a substantial number of recidivists (34 per cent.) were put on probation, the ratio not varying much between the various age groups. As might be expected when applied to recidivists probation operated with decreasing effectiveness, it being worth noting that of those with two or more previous convictions almost half of the adults and as many as six in ten of the juveniles reverted to crime by the end of the follow-up period of three years (p. 7).

In judging the after-conduct of offenders placed on probation the authors state that it is generally admitted that a period of three years provides a fair test (p. 26). This may well be so, but it might have been more convincing if the reader had been allowed to judge for himself the "fairness" of such a period by observing the conviction rates during, say, the first, second, third and, possibly, fourth years after discharge from probation. Another highly interesting conclusion drawn from this study is the established correlation between the likelihood of success during the follow-up period and the offender's conduct during probation. Both with adults and juveniles it was found that satisfactory completion of probation was usually followed by a high rate of success, the best results being shown by those who, on the strength of good progress, were given an early discharge. Some measure of the value of probation can perhaps be gleaned from the knowledge that seven in ten of the men (six in ten of the boys) and eight in ten of women (the same figure for the girls) completed their probation periods satisfactorily *and* preserved a clean sheet during the follow-up period. Judged, on the other hand, by reference to unblemished conduct during the supervisory period only, the above figures rise quite substantially, 86 per cent. of the men (77 per cent. of the boys) and 92 per cent. of the women (91 per cent. of the girls) satisfactorily completing their probation periods (pp. 31–32, 55–56).

The value of these conclusions is self-evident, the details collected in regard to each probationer being comprehensive so far as the behaviour of the probationer is concerned *after he has been before the court and been placed on probation.* Unfortunately, however, no information is given as to such matters as the offender's home, his social and educational background, matters which may be expected to figure prominently in any pre-sentence report considered by the court. To ignore the offender's background, to overlook *what has gone on before the offender is brought before the court and placed on probation* gives the present study a somewhat unbalanced appearance and compares adversely with the Department's earlier study on *Sexual Offences*, Chapter XII of which contains an admirable effort to analyse such factors as the mental abnormality or instability, the intelligence, education and occupation, family background and marital state of those placed on probation following the commission of a sexual crime.

Perhaps the answer lies in the fact that the information collected on this occasion was organised not by the Department of Criminal Science itself but by the Probation Division of the Home Office. In saying this, the present reviewer would, at the same time, pay tribute to the foresight of the official bodies, mentioned in Appendix 1, which were responsible for initiating in 1947 the collation of material without which the present work would not have been possible. It is to be hoped, however, that any future research projects of this nature will endeavour to embrace a wider range of information as the foundation upon which to assess the effectiveness of particular methods of treatment.

J. Ll. J. Edwards.

The Modern Law of Real Property. Eighth edition. By G. C. Cheshire, D.C.L., F.B.A., of Lincoln's Inn, Barrister-at-Law, formerly Vinerian Professor of English Law in the University of Oxford, and J. B. Butterworth, M.A., of Lincoln's Inn, Barrister-at-Law, Fellow and Bursar of New College, Oxford. [London: Butterworth & Co. (Publishers), Ltd. 1958. lxi and 910 and (index) 55 pp. £2 15s. net.]

In the latest edition of this work, that has long been regarded with affection by students and teachers, the radical reorganisation that characterised the previous edition, whereby the subject of family settlements is treated before commercial interests, is maintained, with a slight reversion to the earlier form in that aspects of the settlement most germane to conveyancing are postponed. It is suggested that another rearrangement, though a slight one, would be helpful. Two bites are taken at the subject of fixtures, first at page 102, and later, with special reference to the position between landlord and tenant, at page 375. As a result, it is made difficult for a beginner to realise that as between landlord and tenant two questions arise, first whether or not the object has become a fixture, and secondly if so, whether it is a landlord's or a tenant's fixture. To make this distinction is particularly vital, as the House of Lords failed to do so in the leading case of *Leigh* v. *Taylor* [1902] A.C. 157, and it is doubtful whether their decision for the tenant was on the ground that the tapestry was still a chattel, or a fixture but a tenant's fixture.

In the section on Perpetuities, a welcome reference to the class closing rules was introduced in the previous edition, but in dealing with the case of a contingent gift in a will, it is stated that if no member of the class is in existence at the death of the testator, all those subsequently born constitute the class (p. 264 (c)). Attention might well be drawn to the contrary view expressed by Morris in (1954) 70 L.Q.R. pp. 68–69. In the passage on accumulations, it would add point to the statement that the fourth period

admits of accumulation during successive minorities (p. 282) were the complete facts of the *Cattell Case* given, embracing not merely the birth of Gladys and her subsequent majority, but also the birth of Frederick in 1912: [1914] 1 Ch. 177, 182.

In the chapter on Concurrent Interests, through many editions the only case mentioned to illustrate the pre-1926 rule that husband and wife were sometimes regarded as a single entity has been *Re Jupp* (1888) 39 Ch.D. 148. There is now a welcome footnote (p. 316, n. 3), indicating that the case has been disapproved, but in a brief discussion of a difficult point, why is it necessary to select as an example the one case out of step with the rest of the authorities, especially as the text gives a misleading impression of the actual facts? The text could be left unaltered, provided the footnote reference was to one of the cases in line such as *Re March* (1884) 27 Ch.D. 166 or *Re Wylde* (1852) 2 De G.M. & G. 724.

In the passage on the Statute of Frauds, it should be mentioned that *Burgess* v. *Cox* [1951] Ch. 383 is in conflict with *Martin* v. *Pycroft* (1852) 2 De G.M. & G. 785 (p. 349, n. 4).

In the section on mortgages, it is implied that a mortgagee can exercise his statutory power of granting leases only if he has entered into possession after application to the court (p. 576). The statement at page 603 that priority of mortgages does not depend upon whether the mortgage is legal or equitable is too sweeping, and is not in consonance with the actual treatment of the details at page 609.

In the section on the covenants implied on a conveyance as beneficial owner, it is implied on page 662 that it is only the covenant as to quiet possession that is qualified and not absolute. A careful reading of the following page shows that such an assumption would be ill founded, but a beginner may be left in a state of unnecessary uncertainty. In this context of implied covenants, the reader should be referred to *Fay* v. *Miller, Wilkins* [1941] Ch. 360, where is was held that the alleged covenantor must not only convey as beneficial owner, but actually possess that status.

In dealing with informal revocation of wills by privileged persons, there is mention of the case of the serving soldier who wrote from South Africa asking his sister to burn his will. This is wrongly described as *Re Southerden* [1925] P. 177 (p. 761, n. 1), whereas in fact it is *Re Gossage* [1921] P. 194: moreover, the facts as given in the text are not entirely accurate.

It is the chapter on Easements and Profits that would most benefit by the removal of inaccuracies. First and foremost, the statement in heavy type and as a rubric that the dominant and servient owners must be different persons (p. 450) is unfortunate, even though it has recently received passing approval from the Court of Appeal, as it suggests that a tenant cannot acquire an easement against his landlord, whereas he can do so by express

grant, or under the rule in *Wheeldon* v. *Burrows*, or under section 62 of the Law of Property Act, 1925, or in the case of the easement of light by prescription under the rule in *Morgan* v. *Fear* [1907] A.C. 425. The statement that an easement in perpetuity is necessarily legal requires qualification (p. 444). On the same page, the analogy with Roman law is not with servitudes in general, but with *praedial* servitudes. The right claimed as an easement in *Att.-Gen. for S. Nigeria* v. *John Holt* [1915] A.C. 599 was not *established* as such, but as an irrevocable licence (p. 453). There should be some warning that a right to occupy a particular pew in a church is an easement of an exceptional kind (p. 454). For the facts of *King* v. *David Allen*, the reader is referred to the author's article in (1953) 16 M.L.R. 12–13, where the facts are misstated: it is said that at the time of the action for damages for the failure of the defendant to allow the plaintiff to place advertisements on the flank walls of a cinema, the cinema was not in existence, whereas it had already been completed: [1916] 2 A.C. 54, 56: indeed, the gravamen of the plaintiff's complaint was that when he sought to post bills on the walls, his men were either prevented from so doing, or their work was washed away.

The right of a common owner who sells the quasi-servient tenement to easements by implied reservation is left very much in the air, and the reader is told that the scales are heavily weighted against him (p. 467), but two pages earlier is cited, without comment, the dictum of Lord Parker in *Pwllbach Colliery* v. *Woodman* [1915] A.C. 634, 646–647, which seems to be over-generous towards such a one, and was regarded by Jenkins L.J. in *Re Webb* [1951] Ch. 808, 826, as not supported by the cases. As to acquisition by implied grant, there is no discussion of *Goldberg* v. *Edwards* [1950] Ch. 247, where the Court of Appeal has added to the two original requirements of being continuous and apparent a third requirement that an easement to be so acquired must be necessary to the reasonable enjoyment of the land granted, whereas in the classic judgment in *Wheeldon* v. *Burrows* (1878) 12 Ch.D. 31, 49, settling the ancient controversy, this third requirement is mentioned merely as an alternative to the first two (p. 467).

There are some omissions in the treatment of the acquisition of easements and profits by prescription. On the question of continuity of user, the most instructive case (*Hollins* v. *Verney* (1884) 13 Q.B.D. 304) is not mentioned (p. 474). The passage on disabilities under the Prescription Act contains no reference to the ludicrous situation, whereby if the servient tenement is held by a tenant for years, this is a disability under the forty-year period, provided there is resistance, but never under the twenty-year period: *Palk* v. *Shinner* (1852) 18 Q.B. 215 (p. 481). A beginner could be led astray by the failure to indicate that the

licence in *Frogley* v. *Lovelace* (1859) Johns. 333 was for value (p. 496). Another example under the provisions of the Prescription Act of easements and profits not receiving the same treatment is that section 8 does not apply to profits (p. 497).

In the passage on the extinguishment of easements by unity of seisin, the case of *Richardson* v. *Graham* [1908] 1 K.B. 39, perhaps also requiring unity of possession, is not considered (p. 487). One method of extinguishing a profit alluded to is alteration of the dominant tenement (p. 498), the implication being that it is not a method whereby an easement may be extinguished as it is omitted in that list (pp. 485–487): it is, of course, equally a method of extinguishing an easement: *Liggins* v. *Inge* (1831) 7 Bing. 682, 693.

Most of the criticisms in this review are small matters, but attention to them would add appreciably to the already great debt that teachers and students have owed to this major work for more than a generation.

R. N. Gooderson.

The Definition of Law. By the late Hermann Kantorowicz. Edited by A. H. Campbell, Regius Professor of Public Law in the University of Edinburgh, with an Introduction by A. L. Goodhart, Master of University College, Oxford. [Cambridge: University Press. 1958. xxiv, 108 and (index) 5 pp. 15s. net.]

"Again and again the attempt has been made to ascertain the meaning of law without first inquiring into the nature of such an attempt, without (to quote the title of a well-known book) considering 'the meaning of meaning'. . . . Any question posed by any science as to the meaning of a term can be answered only if the intention is to ask what in *this* particular science *ought* to be understood by this particular term. . . . The answer has therefore the character of a simple *proposal*, and every definition ought to be taken as meaning: 'I propose to understand by this term such and such, and if . . . you wish to understand by the same term something else, you are free to do so provided that you do not read your definition into my words. The value of our respective definitions must be judged by their comparative usefulness.'" This is the promising beginning of Kantorowicz's little book, simple, clear and purposeful. The book was intended as an introduction to a three-volume History of Legal Science which was not completed. It was intended to answer the question "what is legal science?" by answering the question "what is law?"

One thing which Kantorowicz makes very clear at the beginning is that "our own definition of law, conceived as the subject-matter of a history of legal science will not be useful unless it

is broad enough to serve as a basis for a universal history of every known type of juristic thought and legal science." "It will be fruitful in proportion as it merges thought and writing on what language allows to be called law into an historically and logically coherent unit." "It must, above all, be useful in that, by connecting what ought to be connected and separating what ought to be separated, it delimits a subject-matter about which true and important statements can be made, and affords an instrument for the production of exhaustive classifications."

Other limitations, besides usefulness, limit the area of choice. The definition "must at least be compatible with the uses of the particular language or with the rules for the composition of new words," and there is also the question of practical consequences to be taken into account. "Behind a dispute on a definition there always lies a problem of classification, and classifications are concerned with the relations not of names but of things. Whether, for instance, a concept ought to be given or refused a name of which important propositions are predicated is . . . by no means a 'mere' terminological question: the choice does not lie between different terms only, but between the things which they denote." The acceptance of a particular definition may thus have a serious effect on the world at large. Hence the dispute as to whether international law is really law or merely a series of political or moral postulates.

So far, so good. Professor Goodhart, in his Introduction, however, touches on a question which is likely to be raised in the minds of many by the title of this book. "It is clear," he writes, "that Kantorowicz did not sympathise with the view—which has a strong appeal for some students—that the attempt to give a definition to the word law is a futile exercise." How far will this book succeed in persuading such people that they are wrong?

"Difficult research into the usefulness of the proposed definition must accompany the gradual formation and revision of that which is proposed; in presentation this research will usually assume the form of a subsequent justification of the definition." The definition of law he proposes is: "A body of rules prescribing external conduct and considered justiciable." Much of the book is taken up with its justification and the rejection of alternatives. In the course of it Kantorowicz touches on many questions long regarded as fundamental to jurisprudence, such as the relevance of sanctions, the sense in which law is binding, the relation between law and morals, between law and custom, between *a* law and *the* law. Kant, Kelsen, Duguit, Petrazycki are all mentioned. The discussion, however, lacks the clarity and simplicity of the opening chapters. Why should this be? One reason is the need to explain the rejection of alternative definitions. "The usual definitions of law . . . are far too narrow to cover every aspect of this immemorial phenomenon; we must discard many of their limitations

such as positiveness, enforceability, state origin, binding character." The discussion necessitates writing which lacks the smoothness of sustained exposition. Another reason is that we are reading here the fruits of many years' reflections on law by a distinguished jurist, abridged and squeezed into a very small compass. But there is a further reason, and it is connected with the question raised by Professor Goodhart, for though the purpose of the definition remains well to the fore, namely the justification of a broad treatment of legal science, the point of framing one becomes less and less obvious.

Consider, for example, the question whether there is a place for books on legal history in a History of Legal Science; whether in particular Maitland is to have a place in it. Maitland and legal history are grouped in this part of the discussion with Roman law and the American Restatement. Kantorowicz takes the view that their inclusion depends on one's definition of law, and he uses the absurdity of excluding them as an argument against including any reference to binding character in a definition of legal rules. "If," he writes, "one's definition requires a rule to be binding in order to be legal, the fact that classical Roman law was once binding cannot suffice to make a book about it into a juristic work. Conversely, but on the same reasoning, the American 'Restatement of the Law' . . . would lack juristic character. . . . The same definition of law would exclude the history of law from legal science; neither Gierke's nor Maitland's historical works could be called juristic." His definition therefore excludes all reference to the binding character of legal rules. It is in no way strange that Kantorowicz should want to include in the History all that has ever been regarded as legal. And this accounts for his rejection, as a guide to what should be included, of definitions which might exclude such subjects as natural law, international law, Roman law and legal history. Is it, though, necessary to go further and construct a definition which will cover all that he wishes to include and exclude that which has been traditionally distinguished from law, such as morals and social customs? The broader the definition the less significant it becomes; the more varied the things included within it the less they have in common, and the less substantial is the distinction between the things which fall within the definition and the things outside it.

Consider, too, his treatment of primitive societies. "Pre-scientific legal thought has become and still is so important for the understanding of the development of legal science that we must . . . make our concept of law suited to even the most primitive stirrings of legal thought." But must we do this? If pre-scientific legal thought is important for an understanding of legal science, is it necessary to expand the concept of law to justify its inclusion in a History of Legal Science? Kantorowicz has to admit that in primitive societies "rules of law are . . . obeyed unconsciously

in the sense that . . . the men practising the custom would certainly not be capable of formulating it in so many words, still less of subjecting it to ' intellectual elaboration ' and construction." Furthermore, though one of the characteristics of a legal rule in his definition is that it should be considered justiciable, *i.e.*, should be considered capable of application by judicial organs, he is forced to add that " the application of the rule is not to be understood as a necessarily conscious application. . . . In early stages . . . a mere factual conformity of decision and procedure to traditional rules is all that exists and all that is demanded by those concerned. . . . In giving a decision, a primitive judicial organ seems to be consciously applying a rule only in the sense of having a vague notion embodying an as yet embryonic rule, without attempting any analysis of the conditioning facts and the conditioned consequences." Moreover, " there is . . . a serious difficulty arising out of our classification which must be faced. By defining law not with the help of the notion of ' courts of law,' but of ' judicial organs ' (which he did in order to include primitive societies) and thus steering clear of the Charybdis in which so many ships have sunk, we risk being caught near the end of our wearisome voyage by Scylla," since it has now become difficult to distinguish law from social customs, and so a further distinction is necessary.

One cannot help thinking that Kantorowicz's Scylla and Charybdis may be windmills. It is important to see that there are in primitive societies rules which correspond to the rules which in modern societies we call legal, just as it is important to see that the characteristics which municipal and international law have in common may outweigh their differences. The recognition of this importance may be an argument in favour of framing a definition of legal rules and law which would apply to both primitive and modern societies and/or municipal and international law. But is it really profitable to frame " as broad a definition as language will allow " simply to justify the inclusion of primitive societies in a History of Legal Science?

It is not only legal history and primitive societies for which the definition is to cater. " It is an historical fact that the science of law has considered law from every possible point of view." It follows that a definition which has as its goal a concept broad enough " to allow us to combine all these investigations, disciplines and schools in their historical coherence " will be very broad indeed. Even so, Kantorowicz's definition leaves some ends lying loose. The distinction between some of the rules of religious law and rules of ritual is left reluctantly to sociology and theology. Other rules " may . . . be so intimately linked to rules of undoubtedly legal character that they must be, and indeed always are, treated together with them, in the same books, or in the same codes, by the same lawyers, by the same juristic methods, and thus must be considered law." Furthermore, there are borderline cases where

"we are prepared to class the relevant rules as law but must admit that they are not usually made an object of legal science," *e.g.*, the rules applied by the medieval "courts of love," or the rules of sports and games applied by umpires. Perhaps times have changed and we are now more easily persuaded to take a broad view as to what it is proper to include in a History of Legal Science, than in 1939, when this essay was written. It is certainly more likely that more people will be persuaded by Kantorowicz than by his definition, however watertight it proves to be. On this view it is Professor Campbell, in his Preface, who suggests the best way of approaching this book. "The student of jurisprudence," he writes, "will welcome it as a record of views on fundamental questions held by one of the greatest legal scholars of our generation."

GEOFFREY WILSON.

Fountain of Justice : A Study in the Natural Law. By JOHN C. H. WU, LL.B., J.D., LL.D., Professor of Law, Seton Hall University Law School, formerly Chief Justice of the Provisional Court of Shanghai. [London: Sheed & Ward. 1959. ix and 281 pp. 18s. net.]

THIS is a very good book, written by a remarkable man. Dr. Wu is Chinese. He was educated in China, America, France and Germany. He has done a lot, for he has been Chief Justice of the Provisional Court of Shanghai, Minister Plenipotentiary to the Holy See and Professor of Chinese Philosophy in Hawaii. He is now Professor of Law at Seton Hall University School of Law. Though an author's record should not affect one's judgment of the intrinsic merits of his work, it may explain them. Only Dr. Wu could have written this book. He knows Confucianism; he is a convert to Roman Catholicism, and he is a Thomist, or, at least, he is deeply imbued with Thomism. It is with the experience gained from this background that he examines the English common law (which he also knows) and its development both in England and in the United States. His conclusions are set forth with great clarity in beautiful English tinged with Americanisms.

Not surprisingly, it is a little difficult to know into what recognised category this book falls. It is probably a book on jurisprudence. It should certainly be read by every student who takes jurisprudence seriously. But it should also be read by moral theologians and canonists. The opening chapter is particularly valuable for the beginner, for the author there sets forth his understanding of what law is and deals with the nature and meaning of the eternal law, the natural law and human law. His approach, supported by quotations from St. Thomas Aquinas and from Bracton, is in sharp contrast to the Austinian approach, as, for

instance, where he says (on p. 11), "The positivists have laid exclusive emphasis upon the will and power of the political sovereign as the ultimate source of all law, forgetting that it is the law that makes them sovereign." (Presumably for *political* Dicey would substitute *legal*.) But the contrast in approach is modified in application and he adopts St. Thomas's definition of law as "nothing other than a certain rule of reason for the purpose of the common good, laid down by him who is entrusted with the welfare of the community, and promulgated." If there be an apparent contradiction between these two observations, the key to their reconciliation is again provided by St. Thomas, where he defines the natural law as "a participation in the eternal law by the rational creature."

If this book is a useful corrective to the materialistic approach and also to those who have drunk too exclusively from Austin's fountain, it also helps to restore the balance put in peril by Harvey in his recent book, *The Advocate's Devil*.[1] Harvey usefully and healthily debunked much of the adulatory nonsense which has been written about the common law. Dr. Wu greatly admires the common law and clearly brings out some of its best features which *The Advocate's Devil* had no occasion to notice. Dr. Wu also points out the debt which the common law owes to Christian Theology and to the clerks who in the early days were both theologians and lawyers. If he occasionally appears to do less than justice to post-Reformation lawyers, it is perhaps because, as a Roman convert to Christianity, his appreciation of other streams of Christian thought and of the Reformation itself may be understandably limited. Christians who are not of the Roman allegiance will probably share Dr. Wu's unexpected approval of a dictum of Mr. Justice Holmes (quoted on p. 140) that "certainty is generally illusion, and repose is not the destiny of man."

It must not, however, be thought that Dr. Wu has done no more than write a philosophical essay on the nature of law, interesting, but devoid of practical utility. On the contrary: an acceptance of his philosophy could have far-reaching effects on both judge-made law and legislation. There is much which is pertinent to many current topics, such as the *Wolfenden Report* and the question of artificial insemination by a donor. "Human law," he writes (at p. 34), "has often been a subject of ridicule to laymen; when they see that the law does not prohibit all the vices nor prescribe all the virtues, they infer, quite unwarrantably, that the law is immoral, or at least amoral. They do not realise that there are limits to effective legal action. Human law does not approve the vices which it refrains from prohibiting; nor does it frown upon the virtues which it does not think it wise to prescribe for the present." And again (on p. 172) he writes, "The differences and interrelations between law and morals present a fascinating subject

[1] *The Advocate's Devil*, by C. P. Harvey, Q.C. Reviewed in *The Cambridge Law Journal* for November 1958, at p. 256.

of study. . . . If the law does not require everyone to act as the Good Samaritan, it is not because it is not sufficiently Christian to appreciate the beauty of moral goodness, but rather because it is aware of its own limits, and it has to take account of the frailties of human nature and the actual state of civilisation. Jurisprudence would not be prudent if it tried to go beyond the limits of practicability. On the other hand, it would not be just if it did not perform its function as fully as it could within those limits. The end of the law is love, and no measure is set to the end, only to the means. In many matters, the law has to choose the lesser evil."

There is here much food for thought—for the sociologist as well as for the student, the lawyer and the theologian—and for thought as a basis for action. He tells us (p. 31) that Confucius said, "Thinking without study is perilous: study without thinking is vain." Dr. Wu's thinking is of a high order, and his study has ranged over wider fields than most of us can experience. But we can all profit from the fruits of this rare combination which here he offers us.

E. Garth Moore.

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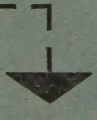

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